(11)

No. 03-10198
Title: Antonio Dwayne Halbert, Petitioner
v.
Michigan
Docketed: May 6, 2004
Lower Ct: Court of Appeals of Michigan
Case Nos.: (244756)
Decision Date: January 13, 2003
Discretionary Court
Decision Date: September 19, 2003
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Nov 20 2003	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due June 7, 2004)
Jun 17 2004	DISTRIBUTED for Conference of September 27, 2004.
Jul 16 2004	Response Requested . (Due August 16, 2004)
Aug 17 2004	Order extending time to file response to petition to and including September 13, 2004.
Sep 10 2004	Brief of respondent Michigan in opposition filed. (Distributed)
Sep 23 2004	DISTRIBUTED for Conference of October 8, 2004.
Oct 5 2004	Record Requested .
Oct 6 2004	Record received from State of Michigan, Circuit Court, County of Saginaw (one envelope)
Oct 8 2004	Record received from State of Michigan Court of Appeals (one envelope).
Jan 3 2005	DISTRIBUTED for Conference of January 7, 2005.
Jan 7 2005	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Jan 21 2005	Joint appendix filed.
Feb 14 2005	Brief of petitioner Antonio Dwayne Halbert filed.
Feb 22 2005	SET FOR ARGUMENT ON Monday, April 25, 2005.
Feb 22 2005	Brief amicus curiae of American Bar Association filed.
Feb 22 2005	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Feb 22 2005	Brief amicus curiae of National Legal Aid and Defender Association filed.
Feb 23 2005	Brief amicus curiae of Wayne County, Michigan filed.
Mar 7 2005	Extension of time within which to file respondent's brief on the merits to and including March 24, 2005.
Mar 11 2005	CIRCULATED.
Mar 16 2005	Record received from the Court of Appeals of Michigan. (1 folder)
Mar 24 2005	Brief amici curiae of Louisiana, et al. filed. (Distributed)
Mar 24 2005	Brief of respondent Michigan filed. (Distributed)
Apr 7 2005	Motion of Louisiana, et al. for leave to participate in oral argument as amicus curiae and for divided argument filed.
Apr 11 2005	Reply of petitioner Antonio Dwayne Halbert filed. (Distributed)
Apr 15 2005	Motion of Louisiana, et al. for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Docket for 03-10198

Apr 25 2005	Argued. For petitioner: David A. Moran, Detroit, Mich. For respondent: Bernard E. Restuccia, Lansing, Mich.; and Gene C. Schaerr, Washington, D.C. (for La., et al., as amici curiae.)

(8)

03-10198

No. _____

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

ANTONIO D. HALBERT, PETITIONER

vs

THE STATE OF MICHIGAN, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

CIRCUIT COURT FOR THE COUNTY OF SAGINAW

PETITION FOR A WRIT OF CERTIORARI

ORIGINAL

ANTONIO D. HALBERT #382400
Robert Cotton Correctional Facility
3510 N. Elm Street
Jackson, Michigan 49201-8877

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QUESTIONS PRESENTED

1. Does Michigan's law and practice of not appointing counsel to indigent defendants convicted by guilty plea, violate Petitioner's Fourteenth Amendment right to due process?

2. Is Petitioner entitled to resentencing, where counsel failed to render effective assistance by not objecting to improper scoring under Michigan's sentencing guidelines which resulted in Petitioner receiving a considerably longer sentence?

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OPINIONS BELOW

None of the opinions entered by the trial court, Michigan Court of Appeals or the Michigan Supreme Court were published.

The December 18, 2001 Order of trial court denying Petitioner's pro-se motion to withdraw plea is appended as Exhibit C.

The December 21, 2001 and October 25, 2002 Orders of the trial court denying Petitioner's request for appointed appellate counsel are appended as Exhibits D and E, respectively.

The January 13, 2003 Order entered by the Michigan Court of Appeals denying Petitioner's "delayed application for leave to appeal" is appended as Exhibit F.

The September 19, 2003 Order entered by the Michigan Supreme Court denying Petitioner's application for leave to appeal the January 13, 2003 order of the Court of Appeals is appended as Exhibit G.

JURISDICTION

Following his conviction by nolo contendere plea, on December 10, 2001, Petitioner was sentence to 2 years to 15 years to run consecutive with a term of 4 years, 5 months to 15 years.

On December 18, 2001, the trial court entered an order denying Petitioner's pro-se motion to withdraw his plea. **Ex. C.**

On December 21, 2001, the trial court denied Petitioner request for appointed appellate attorney and on October 25, 2002, the trial court denied Petitioner's motion requesting appointed appellate counsel. **Ex. D & E.**

On January 13, 2003 the Michigan Court of Appeals entered an Order denying Petitioner's "delayed application for leave to appeal." **Ex. F.**

On September 19, 2003, the Michigan Supreme Court denied Petitioner's pro-se application for leave to appeal the January 13, 2003 order of the Court of Appeals.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statute under Michigan Complied Laws which governs the procedure and practice for determining whether indigent defendants convicted by plea are appointed appellate counsel.

The provisions of MCL 770.3a read as follows:

> Sec. 3a. (1) Except as provided in subsections (2) and (3), a defendant who pleads guilty, guilty but mentally ill, or nolo contendere shall not have appellate counsel appointed for review of the defendant's conviction or sentence.
>
> (2) the trial court shall appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if any of the following apply:
>
> (a) The prosecuting attorney seeks leave to appeal.
>
> (b) The defendant's sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines.
>
> (c) The court of appeals or the supreme court grants the defendant's application for leave to appeal.
>
> (d) The defendant seeks leave to appeal a conditional plea under Michigan Court Rule 6.301(C)(2) or its successor rule.
>
> (3) The trial court may appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if all of the following apply:
>
> (a) The defendant seeks leave to appeal a sentence based upon an alleged improper scoring of an offense variable or a prior record variable.
>
> (b) The defendant objected to the scoring or otherwise preserved the matter for appeal.
>
> (c) The sentence imposed by the court constitutes an upward departure from the upper limit of the minimum sentence range that the defendant alleges should have been scored.
>
> (4) While establishing that a plea of guilty, guilty but mentally ill, or nolo contendere was made understandingly and voluntarily under Michigan Court Rule 6.302 or its successor rule, and before accepting the plea, the court shall advise the defendant that, except as otherwise provided in this section, if the plea is accepted by the court, the defendant waives the right to have an attorney appointed at public expense to assist in filing an

> application for leave to appeal or to assist with other postconviction remedies, and shall determine whether the defendant understands the waiver. Upon sentencing, the court shall furnish the defendant with a form developed by the state court administrative office that is nontechnical and easily understood and that the defendant may complete and file as an application for leave to appeal. **MCL § 770.3a.**

The Sixth Circuit Court of Appeals sitting en banc recently held that this statute is unconstitutional as it offends the Due Process Clause of Fourteenth Amendment of the United States Constitution. See Tesmer v. Granholm, 333 F.3d 683 (CA 6, 2003).

STATEMENT OF THE CASE

On July 7, 2000, Petitioner, Antonio Dwayne Halbert, was charged with three counts of Criminal Sexual Conduct ("CSC"), Second Degree ("2nd"), contrary to Michigan Complied Laws ("MCL") 750.520(C)(1)(a). (People v. Halbert, Dkt. No. 00-19193-FH). On July 11, 2000, Petitioner was arraigned on the charges and a $10,000.00 cash or surety or 10% bond was set.

On December 20, 2000, Petitioner was placed on bond and a preliminary examination was scheduled for August 18, 2000. Given the nature of the charge, as a condition of bond Petitioner was ordered not to reside in the same residence as the victim, his stepdaughter, Shavonne Harris.

On October 19, 2000, the preliminary examination was waived and the case was bound-over to the Saginaw Circuit Court for trial.

On July 12, 2001, police investigated a report from a Michigan National Bank teller that a young girl needed police assistance. Further investigation lead police to Petitioner's former residence, where police spoke with Shavonne and her mother, Wavonne Halbert. Shavonne informed police that Petitioner had sexual assaulted her while she was asleep in the house and had left in his car. Police put out a description of Petitioner's vehicle. Whereupon he was stopped without incident and conveyed to the police station.

During an interview with police, Petitioner stated he was suicidal and wanted to kill himself. Police conveyed Petitioner to Saginaw County Mental Health, where he was evaluation but

not arrested at the time.

Petitioner continued on bond with his caseworker at Saginaw County Mental Health. On July 26, 2001, he was arrested for one count of CSC, MCL 750.520(C)(1)(b). (**People v. Halbert**, **Dkt. No. 01-20597**). Petitioner's bond was revoked.

Pursuant to Michigan Court Rule ("MCR") **6.302(B)(3)**, on November 7, 2001 Petitioner entered a plea of nolo contendere on one count of each docket. In exchanged for his plea, three counts of 2nd Degree CSC were nolle prossed regarding Docket #00-19193-FH. The prosecutor recommended that Petitioner be sentenced within the sentencing guidelines, but requested the court impose consective sentencing. **See** (**Tr. 2; 11/7/01**).[1]

Additionally, the nolo contendere plea was negotiated to preclude Petitioner and his wife, Wavonne Halbert's exposure to civil liability in an active neglect proceeding. (**Tr. 3; 11/7/01**). Petitioner has had a psychiatric history and throughout the trial proceedings he was on the following medications: (1) Gloucopage, Flexiril, Buspar for anxiety, and Celexa for depression. **See** **PSR pp. 1, 9.** In fact, prior to his incarceration, Petitioner received Social Security Disability due to his mental health status. **PSR p. 10.**

By stipulation of the parties, the factual basis for the nolo contendere plea was derived from police reports as referred

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1/ References to the lower court trial proceedings are denoted as "Tr." followed by the page number and date of proceedings. References to the sentencing proceedings are denoted as "S.T." followed by the page number and date. PSR denotes references from the Presentence Investigation Report. Docket Entries are denoted by "DE".

to by the prosecutor. (**Tr. 3; 11/7/01**). The colloquy between the Petitioner and the court with regard to the fundamental rights he would waive by entering his plea was in accordance with MCR **6.302(B)(1) - (5) and (C)**. Of particular import, however, is the following advisement by the court to Petitioner:

> THE COURT: You understand if I accept your plea and you are financially unable to retain a lawyer to represent you on appeal, the Court must appoint an attorney for you **if the sentence I impose exceeds the sentencing guidelines** or you seek leave to appeal a conditional plea or the prosecutor seeks leave to appeal or the Court of Appeals or Supreme Court grants you leave to appeal. **Under those conditions I must appoint an attorney, do you understand that?**
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Further, if you are financially unable to retain a lawyer to represent you on appeal, the Court may appoint an attorney for you if you allege an improper scoring of the sentencing guidelines, you object to the scoring at the time of the sentencing and the sentence I impose exceeds the sentencing guidelines as you allege it should be scored. Under those conditions I may appoint an attorney for you, do you understand that?
>
> THE DEFENDANT: Yes, sir.

(Tr. 7, 11/7/01) (emphasis added).

Here, the court clearly informs Petitioner that it "must appoint an attorney for [him] if the sentence [it] impose exceeds the sentencing guidelines", but indicates an attorney "may" be appointed if an improper scoring of the sentencing guidelines is alleged providing that counsel objects to the scoring at the time of the sentencing and the sentence imposed exceeds the sentencing guidelines in the manner alleged. (**Tr. 7, 11/7/01**).

When accepting the plea the court indicated the following

with regard to the factual basis for the plea.

> THE COURT: The Court has reviewed the preliminary examination in the case involving Maria McKinney and ... I read the police reports involving Shayvon Harris and I find that if the information contained in there were believed by the trier of fact they would prove beyond a reasonable doubt the elements of the two charges here.
>
> Furthermore, because of the potential for civil litigation, the very nature of the case, the no contest plea is appropriate.
>
> Do counsel believe I've complied with the court rule regarding no contest pleas?
>
> MS. MARSHALL: People, are satisfied.
>
> MR. O'FARRELL: Yes, Your Honor.
>
> THE COURT: I will state for the record I have not agreed on a possible plea or possible sentence with the prosecutor, the defendant or anyone acting in the interest of either. I find the plea understandingly made, voluntary and accurate. I'll accept it. I'll refer the matter to the department of corrections for a presentence investigation.

(Tr. 9-10; 11/7/01) (emphasis added).

The court states that it reviewed preliminary examination in the case involving Maria McKinney (i.e. Dkt. No. 00-19193-FH). The problem with this is that there was no preliminary examination in either case involved. **See Appendix "DE" @ 10/19/00; Dkt. # 00-19193-FH; DE @ 9/12/01; Dkt. # 01-20597-FH.**

On December 10, 2001, Petitioner was sentenced to 2 years to 15 years on Docket No. 00-19193 to run consecutive with a 4 year 5 months to 15 years terms on Docket No. 01-20597. **(S.T. 5).** During the proceedings, defense counsel did not object to the scoring of the guidelines, but argued that sentences from each case be served concurrently. **(S.T. 2-4; 12/10/01).**

At the time of sentencing Michigan's legislative sentencing

guidelines were enacted and superseded the former judicial sentencing guidelines. **See MCL 777.1 et. seq.** At the close of sentencing proceedings, Petitioner was provided a "Notice Of Rights After Sentencing (After Plea of Guilty/Nolo Contendere) And Request For Appoint Of Attorney" form. **Ex. A.** He submitted the form that day. **Id.**

On December 17, 2001, Petitioner filed a handwritten pro-se motion to withdraw plea. **See DE 12/17/01; Dkt. No. 00-19193-FH or 01-205976-FH.**[2] The motion claimed that Petitioner should be permitted to withdraw his plea because the sentenced imposed was not consistent with the terms of the plea agreement he discussed with his attorney, which provided that the minimum term of imprisonment would not exceed four years because the two sentences would run concurrently. **See Ex. C.** On December 18, 2001, the trial court entered an order and opinion denying the motion to withdraw because the record did not reveal an agreement as to if the sentences were to run concurrent or consecutive. **Ex. C.**

On December 21, 2001, the court entered an order denying the form Petitioner submitted at sentencing requesting appointment of appellate counsel to assist him in filing an application for leave to appeal to the Michigan Court of Appeals. **See Ex. A & D.** The court's order held that Petitioner did not have a constitutional or statutory right to appointment of appellate counsel to pursue a discretionary appeal, that

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2/ The prisoner who prepared this motion for Petitioner did so without the change of plea and sentencing transcripts.

defendant presented no meritorious issues, that his plea was not conditional, that his sentence was in accordance with plea bargain, that his sentence was within the guidelines, and that his plea was voluntary. **Ex. D.**

Subsequently, Petitioner filed a pleading styled "Motion for Appointment of Counsel and Remand for Evidentiary Hearing/Resentencing". The motion argued that Petitioner's trial counsel failed to render effective assistance of counsel because he was preoccupied with other matters. In support, Petitioner presented a "Stipulation And Order To Adjourn Trial Scheduled For June 12, 1001", wherein the court noted that defense counsel, Rod O'Farrell was advocating in a multi-defendant drug conspiracy trial in the United States District Court. See **Ex. B.** On October 25, 2002, the court denied the motion holding that Petitioner did not "have a constitutional or statutory right to appointment of appellate counsel to pursue a discretionary appeal" and citing People v. Bulger, 462 Mich. 495 (2000), as authority. **Ex. D.**

Next, Petitioner prepared and submitted, pro-se, a delayed application for leave to appeal to the Michigan Court of Appeals ("COA"). **(People v. Halbert, COA No. 244756).** The application argued the following: (1) That Defendant-Appellant was denied effective assistance of counsel at sentencing resulting in a sentence which was based upon improperly scored sentencing guidelines and a combined consecutive sentence which exceeded appropriate scores; and (2) The trial court should ensure that the sentencing guidelines are evaluated for correctness so that

the appropriate minimum sentencing range is applied.

On January 13, 2003, the COA issued an order denying the application for lack of merit in the grounds presented. **Ex. F.**

On February 21, 2003, Petitioner submitted a pro-per application for leave to appeal the COA judgment to the Michigan Supreme Court. **(People v. Halbert, S.C. No. 123342).** The application presented the exact two claims presented to the COA along with the following new issue: That Defendant should have been appointed counsel to assist in filing his application for leave to appeal to the COA, where the issues raised challenged the scoring of the sentencing guidelines and questioned the effectiveness of counsel at sentencing. In support, Petitioner cited the decision of the Sixth Circuit Court of Appeals in **Tesmer v. Granholm, 114 F.Supp.2d 603 (2000),** wherein the court held that Michigan statute MCL 770.3(a)(1) governing the appointment of counsel for indigent defendants who plead guilty or nolo contendere was unconstitutional.[3]

On September 19, 2003, the Michigan Supreme Court entered a majority opinion ordering that the application be denied. **Ex. G.** However, two justices dissented holding that they "would remand to the Court of Appeals for reconsideration of the defendant's application for leave to appeal ..., direct the Court of Appeals, before reconsidering the application, to remand

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3/ Tesmer v. Granholm, **114 F.Supp.2d 603 (2000) (holding MCL 770.3(a)(1) unconstitutional). vacated and remanded, 295 F.3d 536 (CA 6, 2002) (holding MCL 770.3(a)(1) constitutional); vacated, reversed in part, remanded Tesmer v. Granholm, (En Banc) 333 F.2d 683 (CA 6, 2003) (holding MCL 770.3(a) unconstitutional).**

the case to the Saginaw Circuit Court for appointment of counsel ..., [and that] [c]ounsel then could, within a reasonable time limit set by the Court of Appeals, file a supplement which the Court of Appeals would consider as though it were a part of the defendant's initial application." Ex. G.

Because the Michigan Supreme Court has decided an important federal question in a way that conflicts with the decision of the Sixth Circuit Court of Appeals, Petitioner now request this Court exercise its discretionary power and grant petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. MICHIGAN'S PRACTICE AND LAW OF NOT APPOINTING COUNSEL TO INDIGENT DEFENDANTS CONVICTED BY PLEA OF GUILTY, GUILTY BUT MENTALLY ILL, OR NOLO CONTENDERE, VIOLATED PETITIONER'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

In 1994, Michigan voters amended the state constitution to eliminate appeals as of right for criminal defendants who plead guilty, guilty but mentally ill or nolo contendere.[4] See Mich. Const. Art I, § 20. Such defendants must file petitions for appeal, and the Michigan Court of Appeals may grant leave to appeal after review of the petitions.

Practice And Codification:

"Several state judges began to deny appointed appellate counsel to those indigents who plead guilty." See Tesmer v. Granholm, 333 F.3d 683, 687 (CA 6, 2003). The practice was later codified by Michigan's legislature in 2000. The statute

4/ For convention throughout the petition only guilty pleas will be referred to unless otherwise necessary for clarity.

provides that those who plead guilty generally "shall not have appellate counsel appointed for review of the defendant's conviction or sentence." MCL 770.3(a)(1). The statute also provides exceptions to this general prohibition. The court must appoint counsel to aid in review of the conviction or sentence when one of four situations occurs: (1) the prosecution seeks appeal, (2) the sentence exceeds the upper end of the guideline range, (3) the defendant's petition for appeal is granted, or (4) the defendant has entered a conditional plea. MCL 770.3(a)(2).

The court also has discretion to appoint counsel if three situations all occur related to sentencing: (1) the defendant alleges that the sentence was based on improper scoring of the offense or prior record, (2) the defendant objected to the scoring or preserved the matter for appeal, and (3) the sentence was an upward departure from the upper limit of the range that the defendant alleges should have been scored. MCL 770.3(a)(3).

These statutory provisions were addressed and applied by the Michigan Court of Appeals and all defendants convicted by guilty plea at sentencing were provided appeal forms approved by the court administrator listing this information. See People v. Majar, 229 Mich. 393 (1998); People v. Bulger, 462 Mich. 495; 614 N.W.2d 103 (2000); Ex. A. At sentencing on December 10, 2001, Petitioner was given an appeal form with which he could request appointment of appellate counsel. Ex. A.

Before Petitioner pled guilty or his sentence was imposed, three indigent defendants who were denied appointed appellate

counsel brought an action in the Eastern District of Michigan under 42 U.S.C. § 1983, alleging that the practice and the statute violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. See Tesmer v. Granholm, 114 F.Supp.2d 603 (E.D. Mich. 2000). The group of plaintiffs also included two attorneys who accepted appointments in criminal proceedings. The defendant in this action were three Michigan circuit court judges who had denied the indigent plaintiffs appointed appellate counsel and the state attorney general. Id.

After a hearing on motions, the district court found that the plaintiff attorneys had third-party standing and that the court should abstain from hearing indigent Tesmer's claims. The court further declared the challenged statute and practice unconstitutional, but issued no separate judgment or decree. After defendant Judge Lynda Heathscott and non-party Judge Dennis Kolenda refused to appoint appellate counsel for non-party indigents, plaintiffs sought injunctive relief and class certification. On June 30, 2000, the district court entered an injunction against Heathscott and Kolenda, denied certification of a class of judge-defendants, and bound all Michigan State judges to the injunction. See Tesmer v. Kowalski, 114 F.Supp.2d 622 (E.D. Mich. 2000). All this occurred before Petitioner's nolo contendere plead was entered on November 7, 2001 or his sentenced was imposed on December 10th.

The three named judges in the initial suit and Judge Kolenda appealed from the June 30th order and a panel of the Sixth

Circuit Court of Appeals held that abstention barred review of any of the named indigents' claims and that the attorney had third-party standing. It reversed the district court and held that the denial of appointed appellate counsel did not violate the United States Constitution. See Tesmer v. Granholm, 295 F.3d 536 (CA 6, 2002).

A majority of the judges of the Sixth Circuit elected to rehear the appeal en banc. Tesmer v. Granholm, 333 F.3d 683 (CA 6, 2003). The en banc court held: (1) Younger[5] abstention applied to indigents' claims; (2) attorneys had third-party standing; (3) statute violated due process as applied; and (4) injunction enjoining non-party judges from the practice was impermissibly broad. Id. @ 704.

Nothwithstanding, Michigan courts are still bound by precedent. People v. Bajar, supra.; People v. Bulger, supra. As stated, Bulger, was decided after the federal district court in Tesmer v. Granholm, 114 F.Supp.2d 603, was decided holding MCL 770.3 was unconstitutional and before that decision was reversed by a panel of the Sixth Circuit.[6] The court in Bulger held that neither the state nor the federal constitution requires the appointment of counsel under the circumstances of this case. 462 Mich. @ 521-22. The Bulger court reasoned that "the federal

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5/ Younger v. Harris, 401 U.S. 37; 91 S.Ct. 746; 27 L.Ed.2d 669 (1971).

6/ The district court decided Tesmer on March 31, 2002. 114 F.Supp.2d 603 (E.D. Mich. 2000). On May 9, 2000, the district court issued its injunction. 114 F.Supp.2d 622 (E.D. Mich. 2000). The en banc court vacated the panel decision and rendered its judgment on June 17, 2003. 333 F.2d 683 (CA 6, 2003).

constitution does not mandate appointment of counsel under the present circumstances because defendant has not been denied meaningful access to Michigan's Appellate Courts." Id. However, two justices dissented and noted as follows:

> This Court's decision leaves indigent defendants standing in a cloud of dust on the roadside on the way to appellate justice. Defendants who can pay for the services of an attorney will be represented at trial level, will have their cases reviewed by appellate attorneys, and will have lawyerlike presentations to our Court of Appeals. In other words, they will have meaningful appeals. Defendants who cannot pay for an attorney will have trial level representation, and will be left without any appellate representation whatsoever. The only thing more that they will have is the meaningless ritual in our Court of Appeals. **Bulger**, 462 Mich. @ 581 (Cavanagh, J. and Kelly, J., dissenting).

In reaching of this conclusion, the dissenting justices in **Bulger** noted as follows:

> The majority acknowledge[d] that an indigent Proposal B (the voting consideration that ratified the amendment of Art 1, § 20 of Michigan Constitution) defendant's tools are not equivalent to those present in **Ross**[7], but that acknowledgment is akin to an acknowledgment that the Titanic had some difficulty staying afloat. Under the majority's decision, the instant defendant, and every indigent Proposal B defendant, has nothing like the tools present in **Ross**. Instead, they have a meaningless ritual. **Bulger**, 462 Mich. @ 579 (Cavanagh, J. dissenting opinion).

Petitioner's situation is even worse than that envisioned by the dissenting judges in **Bulger**. Specifically, Defendant was sentenced on December 10, 2001. He submitted his request for appointed appellate counsel on December 11, 2001. **Ex. A.** On December 17, 2001, Petitioner filed a handwritten pro-se motion to withdraw plea. **(D.E 12/17/01).** On December 18, 2001,

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7/ **Ross v. Moffitt**, 417 U.S. 600; 94 S.Ct. 2437; 41 L.Ed.2d 341 (1974).

the trial court denied the motion to withdraw plea. **Ex. C.** In that order, the trial court states that "[t]he Defendant's Motion to Withdraw Plea is not timely as it was made after sentencing on December 11, 2001." **Ex. C.** This holding is clearly erroneous.

MCR 6.311(A), governs challenges to plea after sentencing and provides the following:

> (A) **Motion to Withdraw Plea.** The defendant may file a motion to withdraw the plea within the time for filing an application for leave to appeal.[8] After the time for filing an application for leave, the defendant may seek relief in accordance with the procedure set forth in subchapter 6.500.

This provision clearly provides that Petitioner's motions to withdraw his plea was properly made after sentencing. More importantly, the **Bulger** analysis of the **Ross** decision guided it to hold the following procedures necessary to meet the **Ross** meaningful access requirement.

> **B. INDIGENT GUILTY PLEA DEFENDANTS IN MICHIGAN HAVE MEANINGFUL ACCESS TO THE APPELLATE SYSTEM.**
>
> Given the obvious differences between trial-based and guilty plea convictions, it is clear that our current guilty plea procedures provide sufficient methods of assistance to meet the **Ross** meaningful access requirement. To preserve an issue for appeal, a defendant must move to withdraw his plea before the trial court. **MCR 6.311(C).** MCR 6.005(H)(4) states that "unless an appellate lawyer has been appointed, [appointed trial counsel is responsible for the] filing of postconviction motions the lawyer deems appropriate, including motions ... to withdraw plea, or for resentencing." **(emphasis and brackets in original).**

8/ An application for leave to appeal "must be filed within 21 days after the entry of the judgment or order to be appealed from or within other time as allowed by law or rule." **MCR 7.205(A).** A "delayed" application for leave to appeal can be filed 12 months after entry of the order or judgment. **MCR 7.205(F)(3).**

Based upon these provisions, the **Bulger** court held that the "court rules require trial counsel to assist the defendant in organizing and presenting to the trial court any potential appellate issues that warrant perservation. Accordingly, a pro se defendant seeking discretionary review will have the benefit of a transcript, trial counsel's framing of the issues in the motion to withdraw, and the trial court's ruling on the motion." **Bulger**, @ 518.

While this conclusion appears sufficient in theory, in practice it too fails to provide meaningful access to the appellate system. Specifically, MCR 6.005(H)(4) indicates that the filing postconviction motion is contingent upon what "the lawyer deems appropriate." **MCR 6.005(H)(4)**. In the instant case, Petitioner wrote his attorney before sentencing. **Ex. H.** In a letter dated May 21, 2000, his attorney responded indicating his opposition to filing a motion to withdraw and informing Petitioner that he would have to pursue the issue on appeal, pro-se. **Ex. H.** Consequently, Petitioner filed his pro-se motion to withdraw plea without the assistance of counsel or the lower transcripts. **(D.E. 12/17/01)**. Hence, even under the holding in **Bulger**, Petitioner did not have meaningful access to the appellate system.

This conclusion is further supported by two dissenting justices of the Michigan Supreme Court realized this and in a dissenting statement indicated as follows:

> I would remand to the Court of Appeals for reconsideration of the defendant's application for leave to appeal. I would further direct the Court of Appeals, before reconsidering the application, to remand the case to the Saginaw Circuit Court (i.e. trial court) for appointment of counsel. Counsel then could, within a reasonable time limit set by the Court of Appeals, file a supplement with the Court of Appeals would consider as though it were a part of the defendant's initial application." **Ex. G.**

Additionally, the fact that Petitioner claims his trial attorney rendered ineffective assistance of counsel at sentencing also indicates how the **Bulger** court's dependence on the provisions of MCR 6.005(H)(4) is unfounded in this case. Indeed, "an attorney who handles both trial and appeal is unlikely to raise an ineffective assistance claim again himself." **Massaro v. U.S.**, 123 S.Ct. 1690, 1693 (2003) (citing **Massaro v. U.S.**, 27 Fed.Appx. 26 (2001)(unpublished case)). Had appellate counsel been appointed as suggested by the dissenting justices of the Michigan Supreme Court, **Ex. G**, Petitioner would have had the assistance consistent with the **Ross requirement**. Depending on the provisions of MCL 770.3(a)(2), and the general practice of Michigan trial courts, the trial court denied Petitioner such assistance simply because of his indigence. In effect, this practice and law "create a different opportunity for access to the appellate system based upon indigency. As applied, the statute violates the due process provision of the Fourteenth Amendment to the United States Constitution, and is thus unconstitutional." **Tesmer v. Granholm**, 333 F.3d @ 701.

II. DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING, WHERE COUNSEL FAILED TO OBJECT TO THE IMPROPER SCORING.

It is well settled that a criminal defendant is entitled to effective assistance of counsel at all critical stages of the court proceedings. **Strickland v. Washington**, 466 U.S. 668;

104 S.Ct. 2052; 80 L.Ed.2d 674 (1984). Under **Strickland**, a defendant claiming ineffective counsel must show that counsel's actions were not supported by reasonable strategy and that the error was prejudicial. **Id**.

Substantive Law:

"By formal enactment of the Legislature, Michigan became subject to guidelines with sentencing ranges that do require adherence." **People v. Hegwood**, 465 Mich. 432, 438; 636 N.W.2d 127 (2001). Because Petitioner was convicted by nolo contendere plea, as argued, any appeal of his sentence would be by leave and in Michigan is governed by the provisions in MCL 770.3(a). The trial court has discretion to appoint appellate counsel for an indigent defendant in such circumstances "if all of the following apply:

> (a) The defendant seeks leave to appeal a sentence based upon an alleged improper scoring of an offense variable or a prior record variable.
>
> (b) The defendant objected to the scoring or otherwise preserved the matter for appeal.
>
> (c) The sentence imposed by the court constitutes an upward departure from the upper limit of the minimum sentence range that the defendant alleges should have been scored.

(MCL 770.3(3)(a) - (c)).

MCR 6.425(D)(1) provides that "[t]he court must use the sentencing guidelines, as provided by law. Not later than the date of sentencing, the court must complete a sentencing information report ("SIR") on a form to be prescribed by and returned to the state court administrator."

Facts:

The SIR for Docket No. 00-19193 calculated the offense

variable total at 45 and the offense level total at IV, which yielded a minimum sentencing guideline range of 12 to 24 months. **See Ex. I.** The SIR for this case also indicated Petitioner was eligible for a sentence of 24 months probation. **Id**.

Deficient Performance:

In his postconviction motions, Petitioner contended that his Offense Variable score was improper. Specifically, OV-9 requires the trial court to assign ten points to this variable if the crime involves two to nine victims. **MCL 777.39(1)(c).** Further, MCL 777.39(2)(a) specifically states that, in scoring the variable, the trial court must "[c]ount each person who was placed in danger of injury or loss of life as a victim." The Felony Information indicates that count one only involved one victim. **Ex. K; see also (Tr. 2; 11/7/01).** Moreover, the incident connected with count one occurred on June 27, 2000 at the Buena Vista Community Center at 1940 S. Outer Drive. **Ex. K.** Although count two of Information consist of an incident with another individual that allegedly occurred on April or May of 2000, this charged was dismissed pursuant to the plea agreement and did not occur contemporaneously with events connected with count one.

Accordingly, count two clearly was not **"the crime in question"** and the alleged activity connected with that count should not have been considered to calculate OV-9. **See People v. Kimble, 252 Mich App. 269 (2002) (Holding that "OV-9 must be scored at ten points if the 'crime in question' involved two to nine victims'").** The 10 points assigned under OV-9 was

therefore misscored. "A misscoring error might be better characterized as attributing the wrong number of points to an offense variable that would normally apply. **See Kimble, supra. @ 277, n. 6.** Defense counsel's failure to object to this misscoring constitutes deficient performance under **Strickland, supra.**

The twenty-five points assigned to OV-13 is also misscored. MCL 777.43 requires that the offense be part of a pattern of felonious criminal activity involving 3 or more crimes against **"a person"**. Again, the conviction under count one of the information involved only one person, Maria McKinney. **Ex. K.** Hence, the 25 points assigned to OV-13 was misscored. This too reveals that defense counsel's performance was deficient at sentencing.

Prejudice:

Collectively, the misscoring of OV-9 (10pts) and OV-13 (25pts) totals 35 points. Absent this score, the proper sentencing Offense Level is III. Factored with the Prior Record Variable ("PRV") Level of A (i.e. A-III) on the sentencing grid results in a sentencing range of 0-17 months, as opposed to 12 to 24 months. Given the fact that the sentencing court imposed consecutive terms of imprisonment at the top end of the guidelines in both cases, counsel's deficient performance was prejudicial as it subjected Petitioner to a considerably longer term of imprisonment.

Under Case Number 01-20597, the SIR indicates that PRV-7 was misscored at 10 points. **See Ex. J.** PRV-7 requires the

court to score 10 points "if the offender was convicted of multiple felonies counts or was convicted of a felony after the sentencing offense was committed." **MCL 777.7; 2001 Sentencing Guideline Manual ("SGM") @ p. 11.** Petitioner was only convicted of one count under Case Number 01-20597. **Ex. J; (Tr. 2; 11/7/01).** In addition, count one of Case Number 00-19193 occurred on June 27, 2000, **Ex. K,** which is prior to the July 17, 2001 date on which the offense under Case Number 01-020597 occurred. Accordingly, PRV-7 should have been scored zero.

OV-13 was scored at 25 points under Case Number 01-020597. This too is misscored. As argued above, MCL 777.43 requires that the offense be part of a pattern of felonious criminal activity involving 3 or more crimes against **"a person"**. The conviction under Case Number 01-20597 only involved one victim, Shavonne Harris. **Ex. L.** Absent these errors, the actual sentencing level of A-IV, instead of C-IV applied. This results in a sentencing range of 12 to 24 months as opposed to 29 to 57 months. Accordingly, but for counsel's deficient performance, even with the habitual offender enhancement and consecutive service of the two sentences imposed, Petitioner would have received a considerably lesser term of imprisonment.

This Court held in **Glover v. United States, 531 U.S. 198; 121 S.Ct. 696; 148 L.Ed.2d 604 (2001),** that in evaluating a claim of ineffective assistance of counsel, a defense attorney's failure to argue the proper sentencing guidelines scoring may satisfy the prejudice prong of **Strickland.** Where, as here,

counsel failed to object or otherwise advocate misscoring of the sentencing guidelines and such failure resulted in a considerably longer term of imprisonment, his or her performance is deficient and prejudicial, thus constitutes ineffective assistance. **Glover**, **supra.**

In sum, the decision reached by the Michigan Supreme Court in **Bulger**, **supra**., has sanctioned a practice in the trial court of Michigan that denies counsel to indigents who were convicted by plea of guilty, guilty but mental ill or nolo contendere. Such indigent defendants will have trial level representation, and will be left without any appellate representation whatsoever. Conversely, defendants who can pay for the services of an attorney will be represented at trial level, will have their cases reviewed by appellate attorneys, and will have lawyerlike presentations to the Michigan Court of Appeals for appeal by leave.

This ruling by the Michigan Supreme Court is in direct conflict with the decision reached by the Sixth Circuit Court of Appeals sitting en banc in **Tesmer v. Granholm**, 333 F.3d 683 (CA 6, 2003). The rationale by the **Tesmer** Court clearly indicates that the practice and law of Michigan courts offends the due process clause of the Fourteenth Amendment to the United States Constitution as applied by this Court in **Douglas v. California**, 372 U.S. 353; 83 S.Ct. 814; 9 L.Ed.2d 811 (1963) and **Ross v. Moffitt**, 417 U.S. 600; 94 S.Ct. 2437; 41 L.Ed.2d 341 (1974).

Consequently, Petitioner was unable to properly present

his claim that counsel rendered ineffective assistance at sentencing to the Michigan Court of Appeals. Rather, he was only afforded the opportunity to engage in a meaningless ritual.

Because under Michigan law and practice other indigents convicted by guilty plea are similarly situated, this Court should exercise its discretionary jurisdiction and grant certiorari to resolve the questions involved in this matter.

CONCLUSION

WHEREFORE, for the reasons stated heretofore, Petitioner respectfully request this Honorable Court grant certiorari and resolve the questions presented herein as the Court determines comports with justice.

Date: 11/16/03

Antonio Halbert

Antonio Halbert #382400
Petitioner/Pro-per
Thumb Correctional Facility
3225 John Conley Drive
Lapeer, MI. 48446-2987

Order

Entered: September 19, 2003

Michigan Supreme Court
Lansing, Michigan

Maura D. Corrigan,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

123342

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

ANTONIO DWAYNE HALBERT,
Defendant-Appellant.

SC: 123342
COA: 244756
Saginaw CC: 00-19193-FH-2;
01-020597-FH-2

_____/

On order of the Court, the application for leave to appeal the January 13, 2003 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Cavanagh, J., states as follows:

I would remand to the Court of Appeals for reconsideration of the defendant's application for leave to appeal. I would further direct the Court of Appeals, before reconsidering the application, to remand the case to the Saginaw Circuit Court for appointment of counsel. Counsel then could, within a reasonable time limit set by the Court of Appeals, file a supplement which the Court of Appeals would consider as though it were a part of the defendant's initial application.

Kelly, J., joins in the statement of Cavanagh, J.

s0916

Ex. G

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 19, 2003 _____
Clerk

Court of Appeals, State of Michigan

ORDER

PEOPLE v ANTONIO DWAYNE HALBERT

Docket No. 244756

LC No. 00-19193-FH-2; 01-020597-FH-2

HILDA R. GAGE
Presiding Judge

E. THOMAS FITZGERALD

HENRY WILLIAM SAAD
Judges

The Court orders that the defendant-appellant's delayed application for leave to appeal is DENIED for lack of merit in the grounds presented.

HILDA R. GAGE
Presiding Judge

Ex. F

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JAN 13 2003
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

THE PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff,

V.

File No. 00-019193-FH-2
01-020597-FH-2

ANTONIO D. HALBERT,

Defendant.
_____/

ORDER OF THE COURT

At a session of said Court, held in the Courthouse in the City and County of Saginaw, State of Michigan, on the 25th day of October, 2002.

PRESENT: HONORABLE ROBERT L. KACZMAREK, CIRCUIT JUDGE.

This matter comes before the Court for the Appointment of Counsel. In the instant case, an Order was issued by the Court denying the Defendant's Motion for Appellate Counsel. Having reviewed the case and current case law, the defendant does not have a constitutional or statutory right to appointment of appellate counsel to pursue a discretionary appeal. *People v. Bulger*, 462 Mich 495 (2000), *cert den* 121 S.Ct. 486.

THEREFORE, IT IS HEREBY ORDERED that defendant's Motion for Appointment of Counsel is **DENIED**.

It is so ordered.

ROBERT L. KACZMAREK
Circuit Judge
10th Judicial Circuit

Dated: October 25 2002.

A TRUE COPY
Susan Kaltenbach, Clerk

Ex. E

STATE OF MICHIGAN
IN THE CIRCUIT COURT OF THE COUNTY OF SAGINAW

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v.

File No. 01-020597-FH-2
File No. 00-019193-FH-2

ANTONIO HALBERT,

Defendant.
_____/

ORDER OF THE COURT

At a session of said Court, held at the Court House in the City of Saginaw, County of Saginaw, and State of Michigan, this 18th day of December 2001;

PRESENT: HONORABLE ROBERT L. KACZMAREK, Circuit Judge

This matter comes before the Court on Defendant's Motion to Withdraw Plea.

The Defendant was sentenced on December 10, 2001. The Defendant's Motion to Withdraw Plea is not timely as it was made after sentencing on December 11, 2001. After reviewing the record, there was no agreement as to if the sentences were to run concurrent or consecutive. The Defendant's proper remedy is to appeal to the Michigan Court of Appeals. Accordingly, Defendant's motion is **DENIED**.

It is so ordered.

Robert L. Kaczmarek
ROBERT L. KACZMAREK
Circuit Judge
10th Judicial Circuit

Dated: December 18, 2001.

Ex. C

Misc. No. 123342

IN THE

SUPREME COURT OF THE UNITED STATES

ANTONIO D. HALBERT-PETITIONER

VS.

STATE OF MICHIGAN- RESPONDENT(S)

PROOF OF SERVICE

I, Antonio D. Halbert, do swear or declare that on this date, January 22, 2004, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Mike Cox, Attorney General
G. Mennen Williams Bldg., 7th Floor
525 W. Ottawa, P.O. Box 30212 Lansing, MI 48909

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 22, 2004.

INDEX TO APPENDICES

Exhibit A:	Notice Of Rights After Sentencing And Request For Appointment Of Attorney.
Exhibit B:	Stipulation And Order To Adjourn Trial Schedule For June 12, 2001.
Exhibit C:	DECEMBER 18, 2001 Order Of The Court Denying Defendant's Motion To Withdraw Plea.
Exhibit D:	December 21, 2001 Order Denying Defendant's Request For Appointment Of Counsel To File Application For Leave To Appeal.
Exhibit E:	October 25, 2002 Order Of The Court Denying Defendant's Motion For Appellate Counsel.
Exhibit F:	January 13, 2003 Order Of The Michigan Court Of Appeals Denying Defendant's Delayed Application For Leave To Appeal.
Exhibit G:	September 19, 2003 Order Of The Michigan Supreme Court Denying Defendant's Application For Leave To Appeal the January 12, 2003 Order Of The Court Of Appeals.
Exhibit H:	Letter Of May 21, 2002 From Attorney Rod O'Farrell To Petitioner Regarding Postconviction Relief.
Exhibit I:	Sentencing Information Report For Case No. 00-19193
Exhibit J:	Sentencing Information Report For Case No. 01-20597.
Exhibit K:	Felony Information For Case No. 00-19193.
Exhibit L:	Felony Information For Case No. 01-20597.
Docket Entries:	Case No. 00-19193/Register Of Actions.
Docket Entries:	Case No. 01-20597/Register Of Actions.

Approved, SCAO

Original - Trial court
1st copy - Prosecutor
2nd copy - Defendant/Juvenile for
3rd copy - Defendant/Juvenile

STATE OF MICHIGAN 10TH JUDICIAL CIRCUIT SAGINAW COUNTY	NOTICE OF RIGHTS AFTER SENTENCING (AFTER PLEA OF GUILTY/ NOLO CONTENDERE) AND REQUEST FOR APPOINTMENT OF ATTORNEY	CASE NO. 01-20597-FH-2 Judge: R.L.KACZMAREK (P

Court address: 111 SO. MICHIGAN AVE., SAGINAW, MI 48602 — Court telephon

THE PEOPLE OF THE STATE OF MICHIGAN v Defendant/Juvenile name, address, telephone no., and date of b: ANTONIO DWAYNE HALBERT

NOTICE OF APPEAL RIGHTS Note to Court: This Notice must be given to the defendant/juvenile at sentencing

1. If you wish to appeal your plea or sentence, you may file an application for leave to appeal with the Court of Appeals.

2. If you request the appointment of an attorney and are found indigent, the court must appoint an attorney if: a) the prosecut attorney seeks leave to appeal; or b) your sentence exceeds the upper limit of the minimum sentence range of the applica sentencing guidelines; or c) the Court of Appeals or the Supreme Court grants your application for leave to appeal; or d) y seek leave to appeal a conditional plea under MCR 6.301(C)(2).

   If you request the appointment of an attorney and are found indigent, the court may appoint an attorney if: a) you seek lea to appeal a sentence based upon an alleged improper scoring of an offense variable or a prior record variable; and b) you objecte to the scoring or otherwise preserved the matter for appeal; and c) the sentence imposed by the court constitutes an upwa departure from the upper limit of the minimum sentence range that you allege should have been scored.

3. A request for the appointment of an attorney must be made in writing and sent directly to the court at the address noted abov within 42 days. The financial schedule on the back of this form must be completed.

RECEIPT OF NOTICE OF APPEAL RIGHTS AND APPLICATION FOR LEAVE TO APPEAL

On this day I received this form and financial schedule and an application for leave to appeal. I understand that I must return the completed Request for Appointment of Attorney to the court within 42 days if I want an attorney appointed for my appeal.

12 December 2001 — Date
Antonio D. Halbert — Signature of defendant/juvenile

REQUEST FOR APPOINTMENT OF ATTORNEY AND AFFIDAVIT OF INDIGENCY

I request appointment of an attorney to appeal my conviction. Conditions for my request are on the back of this form. The affidavit of indigency and financial schedule on the back of this form is submitted to show my financial condition.
☑ I request the court waive the filing fee for my application for leave to appeal.

12 December 2001 — Date
Antonio D. Halbert — Signature of defendant/juvenile

NOTE TO DEFENDANT/JUVENILE: After completing the request for appointment of attorney and the affidavit of indigency and financial schedule, keep one copy for yourself and return the other copy to the court

Ex A.

STATE OF MICHIGAN

IN THE 10TH CIRCUIT COURT FOR THE COUNTY OF SAGINAW

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff,

v.

File No.: 00-19193-FH 2
HON. ROBERT L. KACZMAREK

ANTONIO HALBERT,

Defendant.
_____/

MICHAEL D. THOMAS (P23539)
Attorney for Plaintiff
111 South Michigan Avenue
Saginaw, Michigan 48602
(989) 790-5330

ROD O'FARRELL (P24899)
Attorney for Defendant
1609 Court Street
Saginaw, Michigan 48602
(989) 792-9767
_____/

STIPULATION AND ORDER TO ADJOURN TRIAL SCHEDULED FOR JUNE 12, 2001

IT IS HEREBY STIPULATED AND AGREED BY Attorney for the People of the State of Michigan, MICHAEL D. THOMAS and Attorney for Defendant, ROD O'FARRELL, that the above entitled cause presently scheduled for trial be adjourned to be reset at a date convenient to all parties, due to Attorney, ROD O'FARRELL is continuing a multi-defendant drug conspiracy trial in the United States District Court, case being United States v. Francis Darrell Hayden, case number 99-CR-20011-BC.

WHEREFORE the parties do stipulate that the trial of this cause presently scheduled be adjourned.

Dated: June 7, 2001
Kathleen Ann Miller
MICHAEL D. THOMAS (P23539)
Attorney for Plaintiff

Dated: June 5, 2001
ROD O'FARRELL (P24899)
Attorney for Defendant

Ex B.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

THE PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff,

File No. 01-020597-FH-2
Judge Robert L. Kaczmarek

V
ANTONIO DEWAYNE HALBERT
Defendant.
_____ /

ORDER DENYING DEFENDANT'S REQUEST FOR APPOINTMENT
OF COUNSEL TO FILE APPLICATION FOR LEAVE TO APPEAL

At a session of said Court, held in the Courthouse in the City and County of Saginaw, State of Michigan, on the 21st day of December, 2001

PRESENT: HONORABLE Robert L. Kaczmarek, Circuit Court Judge

In this cause, defendant has filed a request for a court appointed attorney to assist him in filing an Application for Leave to Appeal to the Court of Appeals following a voluntary plea.

The Court denies appointment of an attorney at public expense for the following reasons:

☑ 1. The defendant does not have a constitutional or statutory right to appointment of appellate counsel to pursue a discretionary appeal. People v_ Bulger, 462 Mich 495 (2000), cert den 121 SCt 486.

☑ 2. The defendant fails to set forth any meritorious issue as required by People v_ Najar, 229 Mich 393 (1998) .

☑ 3. The defendant's plea was not conditional.

☑ 4. The defendant's sentence was in accordance with the plea bargain.

☑ 5. The defendant specifically and voluntarily waived his right to have an attorney appointed at public expense to assist him in filing an application for Leave to Appeal or to assist with other post conviction remedies.

☑ 6. The defendant's sentence was within the sentencing guidelines.

Ex. D

LAW OFFICES OF
ROD O'FARRELL
ATTORNEY AT LAW
1609 COURT STREET
SAGINAW, MICHIGAN 48602

TELEPHONES:
(989) 792-9767
FAX: (989) 792-4991

May 21, 2002

Mr. Antonio Halbert #382400
Muskegon Correctional Facility
2400 South Sheridan Road
Muskegon, Michigan 49442-6298

Re: Your Case

Dear Mr. Halbert:

I received a form letter from you discussing concurrent or consecutive sentencing in your case. Your position that the sentences in your case would run concurrent is not correct. I had extensive discussions with you about the fact that the second occurrence occurred while you were on bond on the first case exposing you to consecutive sentencing.

I will not be able to support you in the position that you are taking because it is contradictory to our discussions and also to the record in regard to the agreements that were reached for your plea. I understand that you are proceeding with your appeal without an Attorney and I wish you the best of luck but you are going to be bound by what is disclosed on the record and the facts of the case.

Very truly yours,

ROD O'FARRELL

RJO/kk

Ex. H

SE. .ENCING INFORMATION REPORT

'ender: Halbert, Antonio Dwayne SSN: 432-25-3270 Workload: 2310 Docket Number: 0019193

dge: The Honorable Robert Kaczmarek Bar No.: P15639 Circuit No.: 10 County: 73

Conviction Information

nviction PACC: 750.520C1A Offense Title: CSC, 2nd Degree (Person Under 13)

me Group: Person Offense Date: 12/20/2000

me Class: Class C Conviction Count: 1 of 2 Scored as of: 12/20/2000

atutory Max: 180 Habitual: No Attempted: No

Prior Record Variable Score

RV1: 0 PRV2: 0 PRV3: 0 PRV4: 0 PRV5: 0 PRV6: 0 PRV7: 0

Total PRV: 0

PRV Level: A

Offense Variable

OV1: 0 OV2: 0 OV3: 0 OV4: 0 OV5: 0 OV6: 0 OV7: 0

OV8: 0 OV9: 10 OV10: 10 OV11: 0 OV12: 0 OV13: 25 OV14: 0

V16: 0 OV17: 0 OV18: 0 OV19: 0

Total OV: 45

OV Level: IV

Sentencing Guideline Range

uideline Minimum Range : 12 to 24

Minimum Sentence

	Months	Life
Probation:	24	☐
Jail:		
Prison:		☐

Sentence Date: 12-10-01

Guideline Departure: No Consecutive Sentence: Yes

Concurrent Sentence: Yes

Sentencing Judge: RJ Hamm Date: 12-10-01

Prepared By: HALL, DEBRA KAY

Ex. I

SE. .ENCING INFORMATION REPORT

'ender: Halbert, Antonio Dwayne SSN: 432-25-3270 Workload: 2310 Docket Number: 0120597

dge: The Honorable Robert Kaczmarek Bar No.: P15639 Circuit No.: 10 County: 73

Conviction Information

nviction PACC: 750.520C1A Offense Title: CSC, 2nd Degree (Person Under 13)

me Group: Person Offense Date: 07/17/2001

me Class: Class C Conviction Count: 2 of 2 Scored as of: 07/17/2001

atutory Max: 180 Habitual: No Attempted: No

Prior Record Variable Score

RV1: 0 PRV2: 0 PRV3: 0 PRV4: 0 PRV5: 0 PRV6: 10 PRV7: 10

Total PRV: 20

PRV Level: C

Offense Variable

OV1: 0 OV2: 0 OV3: 0 OV4: 10 OV5: 0 OV6: 0 OV7: 0

OV8: 0 OV9: 0 OV10: 10 OV11: 0 OV12: 0 OV13: 25 OV14: 0

V16: 0 OV17: 0 OV18: 0 OV19: 0

Total OV: 45

OV Level: IV

Sentencing Guideline Range

uideline Minimum Range : 29 to 57

Minimum Sentence

	Months	Life
Probation:		☐
Jail:		
Prison:		☐

Sentence Date: 12-10-01

Guideline Departure: No Consecutive Sentence: Yes

Concurrent Sentence: Yes

Sentencing Judge: RJ Hamm Date: 12-10-01

Prepared By: HALL, DEBRA KAY

Ex. J

Approved, SCAO

Information - Circuit court
Original complaint - Court
Warrant - Court

Complaint copy - Prosecutor
Complaint copy - Defendant/Attorney

STATE OF MICHIGAN JUDICIAL DISTRICT 10th JUDICIAL CIRCUIT	Page 1 of 3 INFORMATION FELONY	CASE NO. DISTRICT CIRCUIT 00-019193 FH-2

District Court ORI: MI-

Circuit Court ORI: MI-

Defendant's name and address	Victim or complainant
THE PEOPLE OF THE STATE OF MICHIGAN v ANTONIO DWAYNE HALBERT 2545 BEWICK SAGINAW, MI 48601	LORETTA PRICE
	Complaining witness LORETTA PRICE
Co-defendant(s)	Date: On or ~~about~~ before 6/27/00

City/Twp./Village	County in Michigan	Defendant CTN	Defendant SID	Defendant DOB
VARIOUS LOCATIONS IN SAGINAW COUNTY		73 00 004569 01		12/30/67

Police agency report no.	Charge	Maximum penalty
856 2223-00		Defendant DLN

Witnesses

* LORETTA PRICE	* SHAVONNE HARRIS	* JAMES BAKER
* R. WEATHERSPOON	* SHARNAE PERRY	WAVONNE HALBERT
K. MCINERNEY	* ALEXANDRIA BEVERLY	* ERICA FAIRRES
* MARIA MCKINNEY	* DWAYNE FAIRRES	* HELEN DRAKE
* FRED CAVAZOS	* EBONIE MCKINNEY	

STATE OF MICHIGAN, COUNTY OF Saginaw

IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN: The prosecuting attorney for this County appears before the court and informs the court that on the date and at the location described, the defendant:

COUNT I - SECOND DEGREE CRIMINAL SEXUAL CONDUCT - PERSON UNDER THIRTEEN

One Antonio Dwayne Halbert, late of the County of Saginaw, State of Michigan did engage in sexual contact with another person, to-wit: Maria McKinney at the Buena Vista Community Center at 1940 S. Outer Drive on June 27, 2000, said person being under 13 years of age; Contrary to Sec. 750.520c(1)(a); M.S.A. 28.788(3)(1)(a). (750.520C1A)

HIV/STD TESTING NOTICE

Take Notice that pursuant to MCL 333.5129; MSA 14.15(5129), upon bindover to circuit court or recorder's court, the district court judge shall order the defendant to be tested for venereal disease, hepatitis B infection, and for the presence of HIV or an antibody to HIV if the judge determines there is reason to believe the violation involved sexual penetration or exposure to a body fluid of the defendant. If the district judge determines that testing is not required, upon conviction the court must order the defendant to be tested.

FELONY: 15 years; mandatory AIDS/STD testing

*The People intend to produce at trial those witnesses designated by asterisk pursuant to 1986 PA 46.

FILED
SAGINAW COUNTY, MI
Nov 6 10 07 AM '00

and against the peace and dignity of the State of Michigan.

Prosecuting Attorney

11/2/00
Date

By: Barbara L. Meter

BARBARA L. METER

MCL 764.1 et seq.; MSA 28.860 et seq., MCL 766.1 et seq.; MSA 28.919 et seq.; MCL 767.1 et seq.; MSA 28.941 et seq., MCR 6.112(D)

MC 200 (4/89) FELONY SET, Information

CIRCUIT COURT

Ex. K

Approved, SCAO

Original complaint - Court
Warrant - Court

Complaint copy - Prosecutor
Complaint copy - Defendant/Attorney

STATE OF MICHIGAN JUDICIAL DISTRICT 10th JUDICIAL CIRCUIT	Page 2 of 3 INFORMATION FELONY	CASE NO. DISTRICT CIRCUIT 00-019193 FH-2

District Court ORI: MI-

Circuit Court ORI: MI-

Defendant's name and address	Victim or complainant
THE PEOPLE OF THE STATE OF MICHIGAN v ANTONIO DWAYNE HALBERT 2545 BEWICK SAGINAW, MI 48601	LORETTA PRICE
	Complaining witness LORETTA PRICE
Co-defendant(s)	Date: On or ~~about~~ before 6/27/00

City/Twp./Village	County in Michigan	Defendant CTN	Defendant SID	Defendant DOB
VARIOUS LOCATIONS IN SAGINAW COUNTY		73 00 004569 01		12/30/67

Police agency report no.	Charge	Maximum penalty
856 2223-00		Defendant DLN

Witnesses

* LORETTA PRICE	* SHAVONNE HARRIS	*JAMES BAKER
* R. WEATHERSPOON	* SHARNAE PERRY	WAVONNE HALBERT
K. MCINERNEY	* ALEXANDRIA BEVERLY	* ERICA FAIRRES
* MARIA MCKINNEY	* DWAYNE FAIRRES	* HELEN DRAKE
* FRED CAVAZOS	* EBONIE MCKINNEY	

STATE OF MICHIGAN, COUNTY OF Saginaw

IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN: The prosecuting attorney for this County appears before the court and informs the court that on the date and at the location described, the defendant:

COUNT II - SECOND DEGREE CRIMINAL SEXUAL CONDUCT - RELATIONSHIP

One Antonio Dwayne Halbert, late of the County of Saginaw, State of Michigan did engage in sexual contact with another person, to-wit: Shavonne Harris. at 2545 Bewick, on a date in April or May 2000, said victim being at least 13 but less than 16 years of age, to-wit: 13 years old, and the defendant being a member of the same household as the victim; Contrary to Sec. 750.520c(1)(b); M.S.A. 28.788(3)(1)(b). (750.520C1B)

HIV/STD TESTING NOTICE

Take Notice that pursuant to MCL 333.5129; MSA 14.15(5129), upon bindover to circuit court or recorder's court, the district court judge shall order the defendant to be tested for venereal disease, hepatitis B infection, and for the presence of HIV or an antibody to HIV if the judge determines there is reason to believe the violation involved sexual penetration or exposure to a body fluid of the defendant. If the district judge determines that testing is not required, upon conviction, the court must order the defendant to be tested.

FELONY: 15 years; mandatory AIDS/STD testing

*The People intend to produce at trial those witnesses designated by asterisk pursuant to 1986 PA 46.

FILED
SAGINAW COUNTY, MI
Nov 6 10 07 AM '00

and against the peace and dignity of the State of Michigan.

Prosecuting Attorney

11/2/00
Date

By: Barbara L. Meter

BARBARA L. METER

MCL 764.1 et seq.; MSA 28.860 et seq., MCL 766.1 et seq.; MSA 28.919 et seq.; MCL 767.1 et seq.; MSA 28.941 et seq., MCR 6.112(D)

MC 200 (4/89) FELONY SET, Information

CIRCUIT COURT

Approved, SCAO

Original complaint - Court
Warrant - Court

Complaint copy - Prosecutor
Complaint copy - Defendant/Attorney

STATE OF MICHIGAN 10th JUDICIAL DISTRICT JUDICIAL CIRCUIT	Page 3 of 3 INFORMATION FELONY	CASE NO. DISTRICT CIRCUIT 00-019193 FH-2

District Court ORI: MI-

Circuit Court ORI: MI-

Defendant's name and address	Victim or complainant
THE PEOPLE OF THE STATE OF MICHIGAN v ANTONIO DWAYNE HALBERT 2545 BEWICK SAGINAW, MI 48601	LORETTA PRICE
	Complaining witness LORETTA PRICE
Co-defendant(s)	Date: On or ~~before~~ before 6/27/00

City/Twp./Village	County in Michigan	Defendant CTN	Defendant SID	Defendant DOB
VARIOUS LOCATIONS IN SAGINAW COUNTY		73 00 004569 01		12/30/67

Police agency report no.	Charge	Maximum penalty
856 2223-00		

Witnesses — Defendant DLN

* LORETTA PRICE	* SHAVONNE HARRIS	* JAMES BAKER
* R. WEATHERSPOON	* SHARNAE PERRY	WAVONNE HALBERT
K. MCINERNEY	* ALEXANDRIA BEVERLY	* ERICA FAIRRES
* MARIA MCKINNEY	* DWAYNE FAIRRES	* HELEN DRAKE
* FRED CAVAZOS	* EBONIE MCKINNEY	

STATE OF MICHIGAN, COUNTY OF Saginaw

IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN: The prosecuting attorney for this County appears before the court and informs the court that on the date and at the location described, the defendant:

COUNT III - SECOND DEGREE CRIMINAL SEXUAL CONDUCT - PERSON UNDER THIRTEEN
One Antonio Dwayne Halbert, late of the County of Saginaw, State of Michigan did engage in sexual contact with another person, to-wit: Shar'nae Perry, at 2545 Bewick, on a date in June 2000, said person being under 13 years of age; Contrary to Sec. 750.520c(1)(a); M.S.A. 28.788(3)(1)(a). (750.520C1A)
HIV/STD TESTING NOTICE
Take Notice that pursuant to MCL 333.5129; MSA 14.15(5129), upon bindover to circuit court or recorder's court, the district court judge shall order the defendant to be tested for venereal disease, hepatitis B infection, and for the presence of HIV or an antibody to HIV if the judge determines there is reason to believe the violation involved sexual penetration or exposure to a body fluid of the defendant. If the district judge determines that testing is not required, upon conviction the court must order the defendant to be tested.
FELONY: 15 years; mandatory AIDS/STD testing

*The People intend to produce at trial those witnesses designated by asterisk pursuant to 1986 PA 46.

FILED
SAGINAW COUNTY, MI
NOV 6 10 07 AM '00

and against the peace and dignity of the State of Michigan.

Prosecuting Attorney
By: Barbara L. Meter
BARBARA L. METER

11/2/00
Date

MCL 764.1 et seq.; MSA 28.860 et seq., MCL 766.1 et seq.; MSA 28.919 et seq.; MCL 767.1 et seq.; MSA 28.941 et seq., MCR 6.112(D)

MC 200 (4/89) FELONY SET, Information

CIRCUIT COURT

Approved, SCAO

Original complaint - Court
Warrant - Court

Complaint copy - Prosecutor
Complaint copy - Defendant/Attorney

STATE OF MICHIGAN 10th JUDICIAL DISTRICT JUDICIAL CIRCUIT	INFORMATION FELONY	CASE NO. DISTRICT CIRCUIT 01-020597 FH-2

District Court ORI: MI-

Circuit Court ORI: MI-

Defendant's name and address	Victim or complainant
THE PEOPLE OF THE STATE OF MICHIGAN v ANTONIO DWAYNE HALBERT 2545 BEWICK SAGINAW, MI 48601	RUSS UPHOLD
	Complaining witness RUSS UPHOLD
Co-defendant(s)	Date: On or about 7/17/01

City/Twp./Village	County in Michigan	Defendant CTN	Defendant SID	Defendant DOB
~~2545 BEWICK, BUENA VISTA TOWNSHIP~~		~~73 01 004748 01~~		~~12/30/67~~

Police agency report no.	Charge	Maximum penalty
~~856 2825-01~~		

Witnesses — Defendant DLN

* RUSS UPHOLD	* ARETHA BLACKMON	* NEIL SOMERS
* SHAVONNE CHARLENE HARRIS	CONNIE CHAPIN	* DAN REINHARDT
BETTY BLONIARCZYK	DAZARENE BLEDSON	
* ROYANA SILER	* CRAIG TUER	

STATE OF MICHIGAN, COUNTY OF Saginaw

IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN: The prosecuting attorney for this County appears before the court and informs the court that on the date and at the location described, the defendant:

SECOND DEGREE CRIMINAL SEXUAL CONDUCT - RELATIONSHIP
One Antonio Dwayne Halbert, late of the County of Saginaw, State of Michigan did engage in sexual contact with another person, to-wit: Shavonne Harris, said victim being at least 13 but less than 16 years of age, ~~to-wit:~~ Age 14 years, and the defendant being related to the victim by blood or affinity to the fourth degree; Contrary to Sec. 750.520c(1)(b); M.S.A. 28.788(3)(1)(b). (750.520C1B)
HIV/STD TESTING NOTICE
Take Notice that pursuant to MCL 333.5129; MSA 14.15(5129), upon bindover to circuit court or recorder's court, the district court judge shall order the defendant to be tested for venereal disease, hepatitis B infection, and for the presence of HIV or an antibody to HIV if the judge determines there is reason to believe the violation involved sexual penetration or exposure to a body fluid of the defendant. If the district judge determines that testing is not required, upon conviction, the court must order the defendant to be tested.
FELONY: 15 years; mandatory AIDS/STD testing

*The People intend to produce at trial those witnesses designated by asterisk pursuant to 1986 PA 46.

No WIT gunshot residue consequences

and against the peace and dignity of the State of Michigan.

Prosecuting Attorney
By: Paul M. Fehrman
PAUL M. FEHRMAN

10-8-01
Date

MCL 764.1 et seq.; MSA 28.860 et seq., MCL 766.1 et seq.; MSA 28.919 et seq.; MCL 767.1 et seq.; MSA 28.941 et seq., MCR 6.112(D)

MC 200 (4/89) FELONY SET, Information

CIRCUIT COURT

ASE: 00-019193-FH OFFENSE: OFFENSE: 6/27/2000

CTIVE: 10/19/2000 JUDGE: ROBERT L. KACZMAREK
LOSED: 12/11/2001 AGENCY: BUENA VISTA TOWNSHIP POLIC

EFENDANT
ALBERT, ANTONIO DWAYNE
545 BEWICK
AGINAW, MI 48601
OB:12/30/1967
HONE:( ) -

DEFENSE ATTORNEY
O'FARRELL, RODNEY J.
1609 COURT ST
SAGINAW, MI 48602-4070
CT APP

CTN: SID:

SP	CT	SEQ	MCLA/ORDINANCE	CHARGES	DATE	TYPE
NC	1		750.520C1A	2ND DEG CSC-U/13	7/07/2000	F
NP	2	0	750.520C1A	2ND DEG CSC-U/13	7/07/2000	F
NP	3	0	750.520C1A	2ND DEG CSC-U/13	7/07/2000	F

*** END OF CHARGES ***

#/PD	JUDGE/BONDSMAN	TYP	AMOUNT	CHECK	SET/POST	FORF/REV
1	CHRISTOPHER S. BOYD	PB	30000		S 7/11/2000	
	ANTONIO HALBERT	SU/CA/PB			P 7/27/2000	
2	ROBERT L. KACZMAREK	PB	30000	S12/20/2000		
	ANTONIO HALBERT	P12/20/2000				

*** END OF BONDS ***

DATE	CODE	ACTIONS, JUDGMENTS, CASE NOTES	JD CLK
7/07/2000	CF	COMPLAINT FILED	MLD
	WI	WARRANT ISSUED	MLD
	-	TO BUENA VISTA	MLD
7/11/2000	WRT	WARRANT RETURNED	MLD
	FCA	FILE SENT TO COURTROOM FOR ARRAIGNMENT	MLD
	APR	PRELIM EXAM SCHEDULED FOR 7/20/2000 AT 2:30 PM	D5 GCR
	MIT	MITTIMUS	D2 MAL
	ARR	ARRAIGNMENT	D2 SMB
	-	S/M, $10000 C/S/10% BOND EA. COUNT, NO CONTACT W/VICTIM	D2 SMB
7/11/2000	PET	PETITION FOR COURT APPOINTED ATTORNEY	D2 SMB
	APP	APPEARANCE FILED	D5 CEJ
	-	J GUST	D5 CEJ
7/12/2000	FPC	FILE PULLED FOR COURTROOM	D5 JWS
7/14/2000	*DI	VEHICLE INFO/NEW:	D5 BAB
	*DI	PROSECUTOR ADDED: POD	D5 BAB
	OAC	ORDER APPOINTING COUNSEL	C2 CEJ
	APP	APPEARANCE FILED	D5 CEJ
	-	R OFARRELL	D5 CEJ
7/20/2000	*	ADJ PE, WAIVED 14 DAY SETTING, RESET PRELIM	D5 CEJ
7/27/2000	*	JUDGE DEFRANCESCO APPROVED PROPERTY BOND	D5 CEJ
7/31/2000	*	CERTIFIED COPY OF PROPERTY BOND FILED W/REGISTER OF DEE	D5 CEJ
	-	FEE PAID BY R OFARRELL, COPY GIVEN TO ATTORNEY TO TAKE	D5 CEJ
	-	THE JAIL (DEFENDANT MUST BE PLACE ON MOR IN ADDITION TO	D5 CEJ
	-	TO PROPERTY BOND	D5 CEJ
8/02/2000	PMT	$25.00 MOR FEE - RECEIPT 00080317	D5 LKR
8/18/2000	APR	PRELIM EXAM SCHEDULED FOR 9/26/2000 AT 10:15 AM	D5 GCR
9/20/2000	FPC	FILE PULLED FOR COURTROOM	D5 RSF
9/21/2000	*DI	PROSECUTOR CHANGED: OLD: POD NEW: PAM	D5 JKP
9/25/2000	*AT	O'FARRELL, RODNEY J. REPLACES PRO PER AS ATTORNEY	D5 CEJ

*** CONTINUED NEXT PAGE **

CASE: 00-019193-FH OFFENSE: OFFENSE: 6/27/2000

DATE	CODE	ACTIONS, JUDGMENTS, CASE NOTES	JD CLK
9/26/2000	ADJ	ADJOURNED PRELIM EXAM ORIG. SCHED. 9/26/2000	D5 GCR
	APR	PRELIM EXAM SCHEDULED FOR 10/19/2000 AT 1:30 PM	D5 GCR
9/28/2000	*	STIP AND ORDER TO ADJ. PRELIM EX.	D5 SMB
10/11/2000	FPC	FILE PULLED FOR COURTROOM	D5 JWS
10/13/2000	*DI	PROSECUTOR CHANGED: OLD: PAM NEW: KAM	D5 JKP
	*DI	ALT PROSECUTOR CHANGED: OLD: NEW: BLM	D5 JKP
10/19/2000	*	PRELIM WAIVED, BOCC	D5 CEJ
	PEW	PRE-LIMINARY EXAM WAIVED	D5 CEJ
	CTC	CTS 01-00; 02-00; 03-00;	D5 CEJ
	C	CASE FILED WITH CIRCUIT COURT	C2 JAS
10/20/2000	PFC	PULLED FILE FOR COURTROOM	C2 NRP
10/23/2000	APR	ARRAIGNMENT SCHEDULED FOR 11/06/2000 AT 10:00 AM	C2 SRM
10/26/2000	*	WAIVER OF ARRAIGNMENT & ELECTION TO STAND MUTE OR ENTER	C2 PMC
	-	NOT GUILTY PLEA; +++FWD CTRM++	C2 PMC
10/26/2000	SCH	COURT ADMIN TO SCHEDULE	C2 DAC
	-	TRIAL	C2 DAC
10/30/2000	*	WAIVER OF ARRAIGNMENT FILED.	C2 VKM
11/03/2000	ADJ	ADJOURNED ARRAIGNMENT ORIG. SCHED. 11/06/2000	C2 VKM
	-	WAIVER OF ARRAIGNMENT FILED.	C2 VKM
11/07/2000	02R	CT. REPORTER: K. TAGGET, CSR-3584	C2 LDP
	H	HEARING HELD	C2 LDP
	-	PROS. COPPOLINO PLACED ON RECORD THAT WAIVER FILED	C2 LDP
11/07/2000	INF	FELONY INFORMATION FILED BY PROSECUTOR	C2 LDP
	*	REQUEST FOR DISCOVERY (FILED BY PEOPLE)	C2 LDP
	RCO	FILE RETURNED FROM COURT TO CLERK'S OFFICE	C2 VLY
	*	PROOF OF SERVICE (INFORMATION/REQ. DISC'Y)	C2 LDP
11/30/2000	APR	TRIAL SCHEDULED FOR 2/15/2001 AT 8:30 AM	C2 JMM
12/20/2000	*	ORDER MODIFYING PRE-TRIAL RELEASE SUBSTITUTING DAY	C2 LAH
	-	REPORTING FOR ELECTRONIC MONITORING	C2 LAH
1/11/2001	*DI	ALT PROSECUTOR CHANGED: OLD: BLM NEW:	D5 BAB
2/05/2001	PFC	PULLED FILE FOR COURTROOM	C2 VLY
2/15/2001	02R	CT. REPORTER: K. TAGGET, CSR-3584	C2 LDP
	H	HEARING HELD	C2 LDP
	-	DATE SET FOR TRIAL; DEF W/ATTY R. O'FARRELL, PROS. MILL	C2 LDP
	-	DEF ATTY JUST COMPLETED FEDERAL CT TRIAL AND NO TIME FO	C2 LDP
	-	PREPARATION; ADJOURNMENT REQUESTED; NO OBJECTION BY	C2 LDP
	-	PROS.; ADJOURNMENT GRANTED	C2 LDP
2/15/2001	101	BOND CONTINUED PENDING FURTHER PROCEEDINGS.	C2 LDP
	SCH	COURT ADMIN TO SCHEDULE	C2 LDP
	-	TRIAL	C2 LDP
2/15/2001	APR	TRIAL SCHEDULED FOR 6/12/2001 AT 8:30 AM	C2 JMM
	RCO	FILE RETURNED FROM COURT TO CLERK'S OFFICE	C2 VLY
6/06/2001	*	STIP. & ORDER TO ADJOURN TRIAL SCHEDULED FOR 6-12-01, F	C2 VKM
	-	THE REASON: ATTY., R. O'FARRELL IS CONTINUING A MULTI-	C2 VKM
	-	DEF. DRUG CONSPIRACY TRIAL IN THE U.S. DISTRICT COURT.	C2 VKM
6/06/2001	ADJ	ADJOURNED TRIAL ORIG. SCHED. 6/12/2001	C2 VKM
	SCH	COURT ADMIN TO SCHEDULE	C2 VKM
6/07/2001	APR	TRIAL SCHEDULED FOR 8/28/2001 AT 8:30 AM	C2 JMM
	PFC	PULLED FILE FOR COURTROOM	C2 NRP
6/08/2001	RCO	FILE RETURNED FROM COURT TO CLERK'S OFFICE	C2 NRP
7/10/2001	*DI	PROSECUTOR CHANGED: OLD: KAM NEW: PAM	D5 ET

*** CONTINUED NEXT PAGE **

CASE: 00-019193-FH OFFENSE: OFFENSE: 6/27/2000

DATE	CODE	ACTIONS, JUDGMENTS, CASE NOTES	JD	CLK
8/22/2001	*	NTC OF INTENT TO OFFER OTHER ACTS EVIDENCE	C2	LDP
8/23/2001	PFC	PULLED FILE FOR COURTROOM	C2	NRP
8/27/2001	*	STIP. & ORDER TO ADJOURN TRIAL SCHEDULED 8-28-01	C2	VKM
	-	FOR THE REASON: DUE TO ONGOING PLEA NEGOTIATIONS IN	C2	VKM
	-	LIGHT OF A SECOND NEW CASE ARISING & ATTY., R. O'FARREL	C2	VKM
	-	IS SCHEDULED TO BEGIN TRIAL ON THE CASE OF PEOPLE VS	C2	VKM
8/27/2001	SCH	COURT ADMIN TO SCHEDULE	C2	VKM
8/28/2001	RCO	FILE RETURNED FROM COURT TO CLERK'S OFFICE	C2	MIK
	-	TIMOTHY BURCH, 01 019568 FC.	C2	VKM
8/28/2001	ADJ	ADJOURNED TRIAL ORIG. SCHED. 8/28/2001	C2	LDP
	-	STIP/ORDER TO BE SUBMITTED	C2	LDP
8/31/2001	APR	TRIAL SCHEDULED FOR 11/06/2001 AT 8:30 AM	C2	JMM
11/01/2001	PFC	PULLED FILE FOR COURTROOM	C2	MIG
11/06/2001	NH	NOT HEARD	C2	LDP
	-	DEF ATTY IN TRIAL IN CARO; ADJ'D TO 11/7 FOR PLEA	C2	LDP
11/06/2001	APR	ARRGNMT/PLEA SCHEDULED FOR 11/07/2001 AT 8:30 AM	C2	LDP
11/07/2001	02R	CT. REPORTER: K. TAGGET, CSR-3584	C2	LDP
	PLG	DFDT PLEAD GUILTY TO	C2	LDP
	-	DEF W/ATTY R. O'FARRELL, PROS. P. MARSHALL; DEF PLED	C2	LDP
	-	NOLO CONTENDRE TO CT 1, CSC2D DEGREE; PROS. RECOMMENDS	C2	LDP
	-	CTS 2 & 3 BE DISMISSED AT SENTENCING; PROS. RECOMMENDS	C2	LDP
	-	CONSECUTIVE SENTENCING W/01-20597-FH-2; COURT ACCEPTED	C2	LDP
	-	NC PLEA; REF'D TO DOC (DEF ATTY REQUESTS CONC. SENTENCE	C2	LDP
	-	(POLICE RPT SUBMITTED FOR COURT REVIEW)	C2	LDP
11/07/2001	DOC	REFERRED TO DEPARTMENT OF CORRECTIONS	C2	LDP
	NC	NOLLE CONTENDRE PLEA 01-00 2ND DEG CSC-U/13	C2	LDP
	APR	SENTENCE SCHEDULED FOR 12/10/2001 AT 10:15 AM	C2	LDP
	*	DEFN INFO CHANGED BY CIRCUIT COURT PROBATION		LJS
12/05/2001	*	CHARACTER REFERENCE LETTER FROM CATHY E. THOMPSON ON BE	C2	JAS
	-	HALF OF DEF ***FWD TO CTRM***	C2	JAS
12/05/2001	*	CHARACTER REFERENCE LETTER FROM JEFFREY L. THOMPSON,MGR	C2	JAS
	-	ERNS SEAFOOD ON BEHALF OF DEF **FWD TO CTRM***	C2	JAS
12/05/2001	*	CHARACTER REFERENCE LETTER FROM ERNEST THOMPSON SR, OWN	C2	JAS
	-	PRES, ERN'S SEAFOOD ON BEHALF OF DEF ***FWD TO CTRM***	C2	JAS
12/10/2001	07R	CT. REPORTER: T. STEMLER, CSR-4023	C2	LDP
	S	SENTENCED	C2	LDP
	-	DEF W/ATTY RODNEY O'FARRELL, PROS. COPPOLINO, DOC REPR;	C2	LDP
	-	DEF SENTENCED TO 24 MOS MIN/15 YEARS MAX, CREDIT FOR	C2	LDP
	-	164 DAYS; PAY $60 VRF W/IN 30 DAYS; TO BE SERVED PRIOR	C2	LDP
	-	TO AND CONSECUTIVE W/01-20597-FH-2	C2	LDP
12/10/2001	NP	NOLLE PROS 02-00 2ND DEG CSC-U/13	C2	LDP
	NP	NOLLE PROS 03-00 2ND DEG CSC-U/13	C2	LDP
	*	MOTION/ORDER OF NOLLE PROSEQUI	C2	LDP
	NAR	NOTICE OF APPEAL RIGHTS PROVIDED TO DEFENDANT	C2	LDP
	SN	COUNT 01-00 SENTENCED	C2	LDP
12/11/2001	JOS	JUDGMENT OF SENTENCE	C2	LDP
	*	SENTENCING INFORMATION REPORT	C2	LDP
	FDC	FINAL DISPOSITION-GUILTY PLEA	C2	LDP
	*	DEFN INFO CHANGED BY CIRCUIT COURT PROBATION		LJS
12/14/2001	RCO	FILE RETURNED FROM COURT TO CLERK'S OFFICE	C2	MIG
12/17/2001	DM	DEFENSE MOTION	C2	LDP

*** CONTINUED NEXT PAGE **

DATE: 4/01/2002 STATE OF MICHIGAN, CIRCUIT COURT, COUNTY OF SAGINAW PAGE
PEOPLE VS ANTONIO HALBERT

CASE: 00-019193-FH OFFENSE: OFFENSE: 6/27/2000

DATE	CODE	ACTIONS, JUDGMENTS, CASE NOTES	JD	CLK
	-	MTN TO WITHDRAW PLEA; NTC HRG 12/17/01	C2	LDP
12/18/2001	RAC	REQUEST FOR APPELLATE ATTY FORWARDED O-A-C	C2	LDP
	OPO	OPINION AND ORDER OF THE COURT	C2	LDP
	-	DENIES DEF'S MTN TO WITHDRAW PLEA	C2	LDP
12/21/2001	*	ORDER DENYING DEF'S REQUEST FOR APPT.OF COUNSEL TO FILE	C2	LDP
	-	APPL. LEAVE TO APPEAL	C2	LDP
3/06/2002	*	REQUEST FOR DOCUMENTS/TRANSCRIPTS FILED BY DEF ++FWD CT	C2	CMR
3/18/2002	OPO	OPINION AND ORDER OF THE COURT	C2	LDP
	-	GRANTS DEF'S MTN FOR COURT DCMTS; ORDERS CLERK OF CT	C2	LDP
	-	TO FURNISH DEF W/COPY OF HIS FILES, TRANSCRIPTS TO BE	C2	LDP
	-	PREPARED AT NO COST	C2	LDP
3/21/2002	PFC	PULLED FILE FOR COURTROOM	C2	MIG
3/22/2002	*	TRANSCRIPT OF SENTENCE 12/10/01	C2	PMC
3/25/2002	RCO	FILE RETURNED FROM COURT TO CLERK'S OFFICE	C2	MIG
4/01/2002	*	PER ORDER MAILED TO ANTONIO HALBERT #382400 MUSKEGON	C2	FKL
	-	CORR. FAC. 2400 SHERIDAN RD. MUSKEGON, MI. 49442 COPIES	C2	FKL
	-	OF FILE, SENTENCING TRANS. AND DOCKET ENTRIES	C2	FKL

*** END OF CASE ***

CASE: 01-020597-FH OFFENSE: OFFENSE: 7/17/2001

ACTIVE: 9/13/2001 JUDGE: ROBERT L. KACZMAREK
CLOSED: 12/11/2001 AGENCY: BUENA VISTA TOWNSHIP POLIC

A TRUE COPY
Susan Kaltenbach, Clerk

DEFENDANT	DEFENSE ATTORNEY
HALBERT, ANTONIO DWAYNE	O'FARRELL, RODNEY J.
1602 WALNUT	1609 COURT ST
SAGINAW, MI 48601	SAGINAW, MI 48602-4070
DOB:12/30/1967	CT APP
PHONE:( ) -	CTN: SID:

DSP	CT	SEQ	MCLA/ORDINANCE	CHARGES	DATE	TYPE
NC	1	0	750.520C1B	CSC 2ND DEGREE-RELAT	7/18/2001	F
			***	END OF CHARGES ***		

#/P'D	JUDGE/BONDSMAN	TYP	AMOUNT	CHECK	SET/POST	FORF/REV
1	TERRY L. CLARK	SU	50000	S	7/26/2001	
		CA/PB				
		***	END OF BONDS ***			

DATE	CODE	ACTIONS, JUDGMENTS, CASE NOTES	JD	CLK
7/18/2001	CF	COMPLAINT FILED		CEJ
	WI	WARRANT ISSUED		CEJ
	-	TO BVPD		CEJ
7/18/2001	PBF	PROSECUTOR BOND RECOMMENDATION FORM		CEJ
7/26/2001	*AD	ADDR CHG/OLD: 2545 BEWICK		TLN
	*AD	ADDR CHG/NEW: 1602 WALNUT		TLN
	WRE	WARRANT RECALLED		TLN
	FCA	FILE SENT TO COURTROOM FOR ARRAIGNMENT		TLN
	*AT	O'FARRELL, RODNEY J. REPLACES PRO PER AS ATTORNEY		TLN
	APP	APPEARANCE FILED		TLN
	APR	PRELIM EXAM SCHEDULED FOR 8/08/2001 AT 2:30 PM	D2	PE
	OF	ORDER FOR FINGERPRINTS	D2	SMB
	MIT	MITTIMUS	D6	SMB
	ARR	ARRAIGNMENT	D6	MLD
	-	$50,000 C/S/P BOND, NO CONTACT W/VICTIM, HIRE R O'FARRE	D6	MLD
7/26/2001	BCI	BOND CONDITION ISSUED	D6	MLD
7/27/2001	ADJ	ADJOURNED PRELIM EXAM ORIG. SCHED. 8/08/2001	D2	MAL
	APR	PRELIM EXAM SCHEDULED FOR 8/21/2001 AT 1:30 PM	D2	MAL
8/03/2001	FIF	FINGERPRINTS IN FILE	D2	CEJ
8/06/2001	WRT	WARRANT RETURNED	D2	MLD
8/20/2001	ADJ	ADJOURNED PRELIM EXAM ORIG. SCHED. 8/21/2001	D2	MAL
	APR	PRELIM EXAM SCHEDULED FOR 9/12/2001 AT 10:00 AM	D2	MAL
	FPC	FILE PULLED FOR COURTROOM	D2	MAL
9/10/2001	FPC	FILE PULLED FOR COURTROOM	D2	TML
9/12/2001	PEW	PRE-LIMINARY EXAM WAIVED	D2	MLD
	BOC	CTS 01-00;	D2	MLD
	*	PRELIM WAIVED, BOND CONT'D, BOCC	D2	MLD
9/13/2001	C	CASE FILED WITH CIRCUIT COURT	C3	JAS
	*	DEF HAS PRIOR OPEN CASE; 00-19193 FH-2	C3	JMM
	*JU	ROBERT L. KACZMAREK REPLACES LYNDA L. HEATHSCOTT AS JUD	C2	JMM
	PFC	PULLED FILE FOR COURTROOM	C2	CMJ
9/14/2001	ORA	ORDER OF INTERNAL REASSIGNMENT	C2	JMM
9/18/2001	APR	ARRAIGNMENT SCHEDULED FOR 10/01/2001 AT 10:00 AM	C2	SRM

*** CONTINUED NEXT PAGE **

CASE: 01-020597-FH OFFENSE: OFFENSE: 7/17/2001

DATE	CODE	ACTIONS, JUDGMENTS, CASE NOTES	JD	CLK
9/20/2001	ADJ	ADJOURNED ARRAIGNMENT ORIG. SCHED. 10/01/2001	C2	LDP
	-	JUDICIAL CONFERENCE	C2	LDP
9/20/2001	APR	ARRAIGNMENT SCHEDULED FOR 10/08/2001 AT 10:00 AM	C2	LDP
10/08/2001	02R	CT. REPORTER: K. TAGGET, CSR-3584	C2	LDP
	100	DEFENDANT PRESENT IN COURT WITH COUNSEL, WAIVED READING	C2	LDP
	-	OF INFORMATION; STOOD MUTE, COURT ENTERED NOT GUILTY	C2	LDP
	-	PLEA.	C2	LDP
10/08/2001	101	BOND CONTINUED PENDING FURTHER PROCEEDINGS.	C2	LDP
	SCH	COURT ADMIN TO SCHEDULE	C2	LDP
	-	TRIAL	C2	LDP
10/08/2001	INF	FELONY INFORMATION FILED BY PROSECUTOR	C2	LDP
10/09/2001	RCO	FILE RETURNED FROM COURT TO CLERK'S OFFICE	C2	FKL
10/17/2001	APR	TRIAL SCHEDULED FOR 11/06/2001 AT 8:30 AM	C2	JMM
	-	SET AT SAME TIME AS DEF'S OTHER CASE	C2	JMM
11/01/2001	PFC	PULLED FILE FOR COURTROOM	C2	MIG
11/06/2001	NH	NOT HEARD	C2	LDP
	-	DEF ATTY IN TRIAL IN CARO; SET FOR PLEA 11/7	C2	LDP
11/06/2001	APR	ARRGNMT/PLEA SCHEDULED FOR 11/07/2001 AT 8:30 AM	C2	LDP
11/07/2001	02R	CT. REPORTER: K. TAGGET, CSR-3584	C2	LDP
	PLG	DFDT PLEAD GUILTY TO	C2	LDP
	-	DEF W/ATTY R. O'FARRELL, PROS. P. MARSHALL, DOC REPR; D	C2	LDP
	-	PLED NOLO CONTENDRE TO CSC 2ND DEGREE/VICTIM SHAVONNE	C2	LDP
	-	HARRIS; POLICE REPORT PROVIDED TO COURT FOR CONSIDERATI	C2	LDP
	-	PROS. REQUESTS CONSECUTIVE SENTENCINGW/00-10193-FH-2,	C2	LDP
	-	DEF ATTY REQUESTS CONCURRENT; COURT ACCEPTED NC PLEA	C2	LDP
11/07/2001	NC	NOLLE CONTENDRE PLEA 01-00 CSC 2ND DEGREE-RELAT	C2	LDP
	APR	SENTENCE SCHEDULED FOR 12/10/2001 AT 10:15 AM	C2	LDP
	*	DEFN INFO CHANGED BY CIRCUIT COURT PROBATION		LJS
12/05/2001	*	CHARACTER REFERENCE LETTER FROM CATHY E. THOMPSON ON BE	C2	JAS
	-	HALF OF DEF ***FWD TO CTRM***	C2	JAS
12/05/2001	*	CHARACTER REFERENCE LETTER FROM JEFFREY L. THOMPSON, MG	C2	JAS
	-	ERN'S SEAFOOD ON BEHALF OF DEF **FWD TO CTRM***	C2	JAS
12/05/2001	*	CHARACTER REFERENCE LETTER FROM ERNEST THOMPSON SR, OWN	C2	JAS
	-	ERN'S SEAFOOD ON BEHALF OF DEF ***FWD TO CTRM***	C2	JAS
12/10/2001	07R	CT. REPORTER: T. STEMLER, CSR-4023	C2	LDP
	S	SENTENCED	C2	LDP
	-	DEF W/ATTY O'FARRELL, PROS. COPPOLINO, DOC REPR; DEF	C2	LDP
	-	SENTENCED TO 57 MOS. MIN/15 YEARS MAX, TO BE SERVED	C2	LDP
	-	FOLLOWING & CONSECUTIVE W/00-19193-FH-2, NO CREDIT FOR	C2	LDP
	-	TIME SERVED; $60 VRF W/IN 30 DAYS	C2	LDP
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	SN	COUNT 01-00 SENTENCED	C2	LDP
12/11/2001	JOS	JUDGMENT OF SENTENCE	C2	LDP
	*	SENTENCING INFORMATION REPORT	C2	LDP
	FDC	FINAL DISPOSITION-GUILTY PLEA	C2	LDP
	*	DEFN INFO CHANGED BY CIRCUIT COURT PROBATION		LJS
	*	DEFN INFO CHANGED BY CIRCUIT COURT PROBATION		LJS
12/14/2001	RCO	FILE RETURNED FROM COURT TO CLERK'S OFFICE	C4	MIG
12/17/2001	DM	DEFENSE MOTION	C2	LDP
	-	MTN TO WITHDRAW PLEA; NTC HRG 12/17/01, 8:30	C2	LDP
12/18/2001	OPO	OPINION AND ORDER OF THE COURT	C2	LDP

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Supreme Court, U.S.
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No. 03-10198

In the Supreme Court of the United States

Antonio Dwayne HALBERT,

Petitioner,

v

State of MICHIGAN,

Respondent.

On Petition for Writ of Certiorari
to the 10th Judicial Circuit Court, Saginaw County, Michigan

BRIEF IN OPPOSITION TO THE PETITION

MICHAEL A. COX
Michigan Attorney General

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Michigan Solicitor General
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QUESTION PRESENTED

The Michigan Constitution provides that a criminal defendant who pleads guilty or nolo contendere shall not have an appeal of right and shall have a right to appointed appellate counsel "as provided by law." A Michigan statute provides, with significant listed exceptions, that a criminal defendant who pleads guilty or nolo contendere shall not have appointed appellate counsel for discretionary appeals for review of the defendant's conviction or sentence. Petitioner was represented by retained counsel at trial, was convicted on his pleas, and was sentenced according to the Michigan Sentencing Guidelines. Petitioner's requests for appointed counsel to help prepare an application for leave to appeal were denied by the trial court.

I. Does the Fourteenth Amendment guarantee a right to an appointed appellate attorney to help prepare an application for leave to appeal in a discretionary first appeal by an indigent criminal defendant convicted by a guilty plea?

II. Was Petitioner deprived of the right to the effective assistance of counsel when retained trial counsel did not object to the scoring of Prior Record Variables and Offense Variables in determining the proper minimum sentence range under the Michigan Sentencing Guidelines?

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OPINIONS BELOW

Petitioner was convicted on November 7, 2001, and sentenced on December 10, 2001, in the Saginaw, Michigan Circuit Court on his pleas of nolo contendere to two charges of criminal sexual conduct in the second degree, MCL 750.520c. A copy of the plea transcript is attached as Respondent's Appendix 18b. The sentencing transcript is attached as Resp. App. 57b. In docket No. 00-019193 he pleaded to the charge of CSC II, with the victim being a person under 13 years of age, MCL 750.520c(1)(a). He was sentenced to a term of 24 months to 15 years imprisonment. In docket No. 01-020597, he pleaded to the charge of CSC II, with the victim being a person between 13 and 16 years of age and related to the defendant, MCL 750.520c(1)(b)(ii). He was sentenced to a term of 57 months to 15 years, consecutive to the sentence in No. 00-019193. Unreported Judgments of Sentence, Resp. App. 1b, 2b.

In an unreported order entered in both docket numbers on December 18, 2001, the trial court denied Petitioner's motion to withdraw his plea. Resp. App. 64b. In unreported orders entered in the two dockets on December 21, 2001, the trial court denied Petitioner's request for appointed counsel to assist him in filing an application for leave to appeal his convictions. Resp. App. 3b, 7b. In a subsequent unreported order entered with both docket numbers on October 25, 2002, the trial court again denied a motion for appointed appellate counsel. Resp. App. 11b.

In an unreported order entered January 13, 2003, the Michigan Court of Appeals denied Petitioner's delayed pro se application for leave to appeal, "for lack of merit in the grounds presented." Resp. App. 12b.

In an unreported order entered September 19, 2003, the Michigan Supreme Court denied Petitioner's pro se application for leave to appeal. Resp. App. 13b.

JURISDICTION

Petitioner was convicted on his pleas of nolo contendere in the Saginaw County, Michigan, Circuit Court on November 7, 2001. The Michigan Court of Appeals denied his discretionary delayed application for leave to appeal on January 13, 2003. The Michigan Supreme Court denied his discretionary application for leave to appeal on September 19, 2003. The petition for writ of certiorari was filed within 90 days of that date, on November 20, 2003.

This Court's jurisdiction is based on 28 USC § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, and COURT RULES INVOLVED

Federal:

US Const., Amend. 14, § 1:
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Michigan:

Michigan Constitution of 1963:
Mich Const 1963, art 1, § 20:
In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than 12 jurors in prosecutions for misdemeanors punishable by imprisonment for not more than 1 year; to be informed of the nature of the accusation; to be confronted with the witnesses against him or her; to have compulsory process for obtaining witnesses in his or her favor; to have the assistance of counsel for his or her defense; to have an appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court; and as provided by law, when the trial court so orders, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal.

Michigan Compiled Laws
MCL 770.3a Defendant pleading guilty, guilty but mentally ill, or nolo contendere; appointment of appellate counsel.
(1) Except as provided in subsections (2) and (3), a defendant who pleads guilty, guilty but mentally ill, or nolo contendere shall not have appellate counsel appointed for review of the defendant's conviction or sentence.
(2) The trial court shall appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if any of the following apply:
(a) The prosecuting attorney seeks leave to appeal.
(b) The defendant's sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines.
(c) The court of appeals or the supreme court grants the defendant's application for leave to appeal.
(d) The defendant seeks leave to appeal a conditional plea under Michigan Court Rule 6.301(C)(2) or its successor rule.
(3) The trial court may appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if all of the following apply:
(a) The defendant seeks leave to appeal a sentence based upon an alleged improper scoring of an offense variable or a prior record variable.

(b) The defendant objected to the scoring or otherwise preserved the matter for appeal.
(c) The sentence imposed by the court constitutes an upward departure from the upper limit of the minimum sentence range that the defendant alleges should have been scored.
(4) While establishing that a plea of guilty, guilty but mentally ill, or nolo contendere was made understandingly and voluntarily under Michigan Court Rule 6.302 or its successor rule, and before accepting the plea, the court shall advise the defendant that, except as otherwise provided in this section, if the plea is accepted by the court, the defendant waives the right to have an attorney appointed at public expense to assist in filing an application for leave to appeal or to assist with other postconviction remedies, and shall determine whether the defendant understands the waiver. Upon sentencing, the court shall furnish the defendant with a form developed by the state court administrative office that is nontechnical and easily understood and that the defendant may complete and file as an application for leave to appeal.

MCL 750.520c (in pertinent part):
(1) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:
(a) That other person is under 13 years of age.
(b) That other person is at least 13 but less than 16 years of age and any of the following:
(i) The actor is a member of the same household as the victim.
(ii) The actor is related by blood or affinity to the fourth degree to the victim.
(iii) The actor is in a position of authority over the victim and the actor used this authority to coerce the victim to submit.
(iv) The actor is a teacher, substitute teacher, or administrator of the public or nonpublic school in which that other person is enrolled.
* * *
(2) Criminal sexual conduct in the second degree is a felony punishable by imprisonment for not more than 15 years.

Rule 7.203 Jurisdiction of the Court of Appeals
(A) Appeal of Right. The court has jurisdiction of an appeal of right filed by an aggrieved party from the following:
(1) A final judgment or final order of the circuit court, or court of claims, as defined in MCR 7.202(7), except a judgment or order of the circuit court
(a) on appeal from any other court or tribunal;
(b) in a criminal case in which the conviction is based on a plea of guilty or nolo contendere;
An appeal from an order described in MCR 7.202(7)(a)(iii)-(v) is limited to the portion of the order with respect to which there is an appeal of right.
(2) A judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established by law or court rule;
(B) Appeal by Leave. The court may grant leave to appeal from:
(1) a judgment or order of the circuit court, court of claims, and recorder's court which is not a final judgment appealable of right;
(2) a final judgment entered by the circuit court or the recorder's court on appeal from any other court;

(3) a final order of an administrative agency or tribunal which by law is appealable to or reviewable by the Court of Appeals or the Supreme Court;
(4) any other judgment or order appealable to the Court of Appeals by law or rule;
(5) any judgment or order when an appeal of right could have been taken but was not timely filed.

Rule 7.205 Application for Leave to Appeal (in pertinent part)

(A) Time Requirements. An application for leave to appeal must be filed within 21 days after entry of the judgment or order to be appealed from or within other time as allowed by law or rule.

(B) Manner of Filing. To apply for leave to appeal, the appellant shall file with the clerk:

(1) 5 copies of an application for leave to appeal (one signed), stating the date and nature of the judgment or order appealed from; concisely reciting the appellant's allegations of error and the relief sought; setting forth a concise argument, conforming to MCR 7.212(C), in support of the appellant's position on each issue; and, if the order appealed from is interlocutory, setting forth facts showing how the appellant would suffer substantial harm by awaiting final judgment before taking an appeal;
(2) 5 copies of the judgment or order appealed from, of the calendar or docket entries, of the opinion or findings of the lower court, tribunal or agency, and of any opinion or findings reviewed by the lower court, tribunal or agency;
(3) if the appeal is from an administrative tribunal or agency, or from a circuit court on review of an administrative tribunal or agency, evidence that the tribunal or agency has been requested to send its record to the Court of Appeals;
(4) 1 copy of certain transcripts, as follows:

(a) in an appeal relating to the evidence presented at an evidentiary hearing in a civil or criminal case, the transcript of the evidentiary hearing, including the opinion or findings of the court which conducted the hearing;
(b) in an appeal from the circuit court or recorder's court after an appeal from another court, the transcript of proceedings in the court reviewed by the circuit court or recorder's court;
(c) in an appeal challenging jury instructions, the transcript of the entire charge to the jury;
(d) in an appeal from a judgment in a criminal case entered pursuant to a plea of guilty or nolo contendere, the transcripts of the plea and sentence;
(e) in an appeal from an order granting or denying a new trial, such portion of the transcript of the trial as, in relation to the issues raised, permits the court to determine whether the trial court's decision on the motion was for a legally recognized reason and based on arguable support in the record;
(f) in an appeal raising a sentencing issue, the transcript of the sentencing proceeding and the transcript of any hearing on a motion relating to sentencing;
(g) in an appeal raising any other issue, such portion of the transcript as substantiates the existence of the issue, objections or lack thereof, arguments of counsel, and any comment or ruling of the trial judge.

If the transcript is not yet available, or if there is no record to be transcribed, the appellant shall file a copy of the certificate of the court reporter or recorder or a statement by the

appellant's attorney as provided in MCR 7.204(C)(2). The appellant must file the transcript with the Court of Appeals as soon as it is available.
(5) if the appeal is from a probate court order, 5 copies of the probate court's certification of the issue, as required by law;
(6) proof that a copy of the filed documents was served on all other parties; and
(7) the entry fee.

(C) Answer. Any other party in the case may file with the clerk, within 21 days of service of the application,

(1) 5 copies of an answer to the application (one signed) conforming to MCR 7.212(D), except that transcript page references are not required unless a transcript has been filed; and
(2) proof that a copy was served on the appellant and any other appellee.

(D) Decision.

(1) There is no oral argument. The application is decided on the documents filed and, in an appeal from an administrative tribunal or agency, the certified record.
(2) The court may grant or deny the application; enter a final decision; grant other relief; request additional material from the record; or require a certified concise statement of proceedings and facts from the court, tribunal, or agency whose order is being appealed. The clerk shall enter the court's order and mail copies to the parties.
(3) If an application is granted, the case proceeds as an appeal of right, except that the filing of a claim of appeal is not required and the time limits for the filing of a cross appeal and for the taking of the other steps in the appeal, including the filing of the docketing statement (28 days), and the filing of the court reporter's or recorder's certificate if the transcript has not been filed (14 days), run from the date the order granting leave is certified.
(4) Unless otherwise ordered, the appeal is limited to the issues raised in the application and supporting brief.

(E) Emergency Appeal.

(1) If the order appealed requires acts or will have consequences within 56 days of the date the application is filed, appellant shall alert the clerk of that fact by prominent notice on the cover sheet or first page of the application, including the date by which action is required.
(2) When an appellant requires a hearing on an application in less than 21 days, the appellant shall file and serve a motion for immediate consideration, concisely stating facts showing why an immediate hearing is required. A notice of hearing of the application and motion or a transcript is not required. An answer may be filed within the time the court directs. If a copy of the application and of the motion for immediate consideration are personally served under MCR 2.107(C)(1) or (2), the application may be submitted to the court immediately on filing. If mail service is used, it may not be submitted until the first Tuesday 7 days after the date of service, unless the party served acknowledges receipt. In all other respects, submission, decision, and further proceedings are as provided in subrule (D).

(F) Late Appeal.

(1) When an appeal of right or an application for leave was not timely filed, the appellant may file an application as prescribed in subrule (B), file 5 copies of a statement of facts explaining the delay, and serve 1 copy on all other parties. The answer may challenge the

claimed reasons for delay. The court may consider the length of and the reasons for delay in deciding whether to grant the application. In all other respects, submission, decision, and further proceedings are as provided in subrule (D).

(2) In a criminal case, the defendant may not file an application for leave to appeal from a judgment of conviction and sentence if the defendant has previously taken an appeal from that judgment by right or leave granted or has sought leave to appeal that was denied.

(3) Except as provided in subrule (F)(4), leave to appeal may not be granted if an application for leave to appeal is filed more than 12 months after the later of:

(a) entry of a final judgment or other order that could have been the subject of an appeal of right under MCR 7.203(A), but if a motion described in MCR 7.204(A)(1)(b) was filed within the time prescribed in that rule, then the 12 months are counted from the time of entry of the order denying that motion; or

(b) entry of the order or judgment to be appealed from, but if a motion for new trial, a motion for rehearing or reconsideration, or a motion for other postjudgment relief was filed within the initial 21-day appeal period or within further time the trial court may have allowed during that 21-day period, then the 12 months are counted from the entry of the order denying the motion.

* * *

STATEMENT OF THE CASE

A. Facts and Procedural History.

Petitioner was arrested and charged in a felony information in the Saginaw County, Michigan, Circuit Court with three counts of Criminal Sexual Conduct in the Second Degree with three different victims in two different locations on three different dates between April and June 2000. Docket No. 00-019193, Resp. App. 14b, 15b, 16b. Count I alleged violation of MCL 750.520c(1)(a), criminal sexual conduct with a person under 13 years of age (a 10-year-old female). Count II alleged violation of MCL 750.520c(1)(b), criminal sexual conduct with a victim at least 13 but less than 16 years old, with the victim being a member of Petitioner's household (Petitioner's 13-year-old stepdaughter). Count III alleged violation of MCL 750.520c(1)(a), criminal sexual conduct with a person under 13 years of age (a six-year-old female). Petitioner was released on bond in December 2000, one of the conditions of which was that he not reside at the residence of the victim in Count II, his stepdaughter.

Approximately seven months after his release on bond, he was arrested in July 2001 and charged in a felony information in the Saginaw County, Michigan, Circuit Court with one count of Criminal Sexual Conduct in the Second Degree, MCL 750.520c(1)(b), criminal sexual conduct with a victim at least 13 but less than 16 years old, and being related to the victim (a new offense against Petitioner's then 14-year-old stepdaughter, the same victim as in Count II of the earlier charge). Docket No. 01-020597, Resp. App. 17b.

Petitioner remained in custody and was represented by retained counsel throughout the trial court proceedings on all offenses.

In a proceeding in the Saginaw County Circuit Court on November 7, 2001, Petitioner entered pleas of nolo contendere to Count I in Docket No. 00-019193 and the sole count in

Docket No. 01-020597.[1] In exchange, the prosecution agreed to dismiss Counts II and III of Docket No. 00-019193 and recommend that Petitioner be sentenced within the Michigan Sentencing Guidelines. The prosecution also requested consecutive sentencing.[2] Petitioner requested concurrent sentencing. The trial court engaged in a colloquy with Petitioner, under oath, as required by Court Rule, MCR 6.302, to ascertain that the pleas were "understanding, voluntary, and accurate." The plea transcript is attached as Resp. App. 18b. The court informed Petitioner of the many rights he would be giving up by pleading instead of going to trial, including the right to appeal and the right to appointed appellate counsel, plea transcript, pp 7-8:

> THE COURT: You understand if I accept your plea you are giving up or waiving any claim of an appeal as of right.
>
> THE DEFENDANT: Yes, sir.
>
> * * *
>
> THE COURT: You understand if I accept your plea and you are financially unable to retain a lawyer to represent you on appeal, the Court must appoint an attorney for you if the sentence I impose exceeds the sentencing guidelines or you seek leave to appeal a conditional plea or the prosecutor seeks leave to appeal or the Court of Appeals or Supreme Court grants you leave to appeal. Under those condition I must appoint an attorney, do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Further, if you are financially unable to retain a lawyer to represent you on appeal, the Court may appoint an attorney for you if you allege an improper scoring of the sentencing guideline, you object to the scoring at the time of the sentencing and the sentence I impose exceeds the sentencing guidelines as you allege it should be scored. Under those conditions I may appoint an attorney for you, do you understand that?
>
> THE DEFENDANT: yes, sir. [Resp. App. 24b-25b.]

The Court also reiterated that the prosecution was recommending consecutive sentencing and defendant's counsel was recommending concurrent sentencing but that the Court had not agreed on a possible sentence. Petitioner, his counsel, and the prosecutor agreed that the Court had stated the complete terms of the plea and that there were no other promises. Sentencing transcript, pp 8-10; Resp. App. 25b -26b. The Court then accepted the pleas and referred the case to the Michigan Department of Corrections for a presentence investigation report, MCL 771.14.

Under Michigan's indeterminate sentencing framework, the maximum sentences are set by statute and the minimum sentence ranges are determined by using the Michigan Sentencing Guidelines.[3] The presentencing investigation report included a Sentencing Information Report (Petitioner's Appendix I and J) for each offense prepared according to the Guidelines. Excerpts from the Michigan Sentencing Guidelines Manual, 2001 Edition are attached at Resp. App. 29b. The two crimes to which Petitioner pleaded, Criminal Sexual Conduct in the Second Degree, each have a statutory maximum penalty of 15 years imprisonment. MCL 750.520c(2). For purposes of the establishing the minimum sentence under the Guidelines, these crimes are classified as Class C Crimes Against a Person. Prior Record Variables (PRV) and Offense Variables (OV) are evaluated for each offense and assigned numerical values. These numerical values are then compared against a grid, Resp. App. 56b, to determine the minimum sentence range. For Docket No.00-019193, the total PRV was zero, and the total OV was 45 (OV 9,

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[1] Petitioner entered pleas of nolo contendere rather than guilty because of the potential for civil liability in an ongoing neglect petition concerning the victim-stepdaughter. Plea transcript, p 3; Resp. App. 20b.

[2] Because the second offense was committed while the first charges were pending, the trial court had discretion to impose consecutive, rather than concurrent, sentencing. MCL 768.7b(2):

> (2) Beginning January 1, 1992, if a person who has been charged with a felony, pending the disposition of the charge, commits a subsequent offense that is a felony, upon conviction of the subsequent offense or acceptance of a plea of guilty, guilty but mentally ill, or nolo contendere to the subsequent offense, the following shall apply:
> (a) Unless the subsequent offense is a major controlled substance offense, the sentences imposed for the prior charged offense and the subsequent offense may run consecutively.

[3] Sentencing guidelines are governed by statute, MCL 777.1 *et seq*. The Michigan Supreme Court has promulgated a Michigan Sentencing Guidelines Manual, the current version of which can be found on the Michigan Courts Web site. http://courts.michigan.gov/mji/resources/sentencing-guidelines/sg.htm.

"Number of Victims" (three) = 10 points; OV 10, "Exploitation of a Vulnerable Victim" (youth) = 10 points; OV 13, "Continuing Pattern of Criminal Behavior" (three or more crimes against a person) = 25 points). Application of these values to the grid for this Crime Class yielded a Guideline Minimum Range of 12 to 24 months. For Docket No. 01-020597, the total PRV was 20 (PRV 6, "Relationship to the Criminal Justice System" (offender on bond awaiting adjudication or sentencing for a felony) = 10 points; PRV 7, "Subsequent or Concurrent Felony Convictions" (offender has one subsequent or concurrent conviction) = 10 points). The total OV value was 45 (OV 4 "Psychological Injury to a Victim" (serious psychological injury) = 10; OV 10, "Exploitation of a Vulnerable Victim" (youth) = 10 points; OV 13, "Continuing Pattern of Criminal Behavior" (three or more crimes against a person) = 25 points). Application of these values to the grid for this Crime Class yielded a Guideline Minimum Range of 29 to 57 months.

At the sentencing hearing on December 10, 2001, Petitioner was still represented by his retained counsel. The transcript of the sentencing hearing is attached at Resp. App. 57b. The Court inquired of Petitioner and his counsel whether they had reviewed the Presentence Investigation Report prepared by a Department of Corrections employee named Deborah Hall, which included the sentence guidelines determinations, Sentencing Transcript pp 2-3; Resp. App. 58b-59b:

> THE COURT: Have you had a chance to talk to the Department of Corrections about what happened here?
>
> THE DEFENDANT: Have I had a chance to talk with them?
>
> THE COURT: Did you talk to Miss Hall?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Did you review her report?
>
> THE DEFENDANT: Yes, sir.

> THE COURT: Is there anything inaccurate in the report?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Counsel have a chance to review the report?
>
> MR. O'FARRELL: Yes, your Honor. Rod O'Farrell on behalf of Mr. Halbert. I read through it with him at the end of last week. It is accurate. We have no additions or corrections.
>
> THE COURT: Anything in addition to the report?
>
> MR. O'FARRELL: No, your Honor, not at this time.

The Court then heard a statement by Petitioner's counsel asking for concurrent rather than consecutive sentencing, a victim impact statement from the father of one of the child victims, and a statement from Petitioner. The Court then imposed consecutive sentences within the guidelines, of 24 months to 15 years and 57 months to 15 years. Resp. App. 61b, 1b, 2b. Petitioner was given, and then signed and filed, a form entitled "Notice of Rights After Sentencing (after Plea of Guilty/Nolo Contendere) and Request for Appointment of Attorney." Resp. App. 3b, 7b.

In an unreported order entered in both docket numbers on December 18, 2001, the trial court denied Petitioner's motion to withdraw his plea. Resp. App. 64b. In unreported orders entered in the two dockets on December 21, 2001, the trial court denied Petitioner's request for appointed counsel to assist him in filing an application for leave to appeal his convictions. Resp. App. 3b, 7b. Petitioner filed a motion for appointment of counsel, an evidentiary hearing, and resentencing on September 11, 2002. Resp. App. 65b. In an unreported order entered with both docket numbers on October 25, 2002, the trial court again denied a motion for appointed appellate counsel. Resp. App. 11b.

Petitioner filed a pro se application for leave to appeal to the Michigan Court of Appeals on November 5, 2002, on a form provided by the State Court Administrative Office. Copy (without attachments) attached at Resp. App. 70b. That application challenged the scoring of the sentencing guidelines and alleged ineffective assistance of trial counsel, and included a copy of the motion filed in the trial court on September 11, 2002, that referred to an alleged right to appointed appellate counsel. The prosecutor did not file a response. In an unreported order entered January 13, 2003, the Michigan Court of Appeals denied Petitioner's delayed pro se application for leave to appeal, "for lack of merit in the grounds presented." Resp. App. 12b.

Petitioner filed a pro se application for leave to appeal to the Michigan Supreme Court on a form provided by Prison Legal Services of Michigan. A copy (without Petitioner's attachments) is attached at Resp. App. 74b. That application challenged the scoring of the sentencing guidelines, alleged ineffective assistance of trial counsel, and raised for the first time as "New Issue I" of entitlement to appointed appellate counsel. The prosecutor did not file a response. In an unreported order entered September 19, 2003, the Michigan Supreme Court denied Petitioner's pro se application for leave to appeal. Resp. App. 13b.

B. The Michigan Framework For Appeals From Guilty Pleas.

The Michigan Constitution provides that "an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court." Mich Const 1963, art I, § 20. The Michigan statute challenged in this petition, MCL 770.3a provides, with significant listed exceptions, that criminal defendants who plead guilty, guilty but mentally ill, or nolo contendere shall not have appointed appellate counsel for these discretionary appeals of the convictions or sentences.[4]

[4] MCL 770.3a applies to appeals from convictions based on pleas of guilty, guilty but mentally ill, and nolo contendere. For convenience, this Brief uses the term "guilty plea" to apply to all three types of convictions.

Michigan has a two-tier appellate court system consisting of the intermediate Court of Appeals and the Michigan Supreme Court. The Michigan Court of Appeals has jurisdiction of appeals of right from most final judgments or final orders of the circuit courts.[5] MCR 7.203(A). Some appeals, including criminal cases like the present one in which the conviction is based on a guilty plea, are discretionary, by leave granted. Mich Const 1963, art 1, § 20; MCL 600.308(2)(d), 770.3(1)(d); MCR 7.203(B). All appeals to the Michigan Supreme Court are discretionary, by leave granted. MCL 770.3(6); MCR 7.301.

The requirements for filing an application for leave to appeal to the Michigan Court of Appeals in discretionary appeals like the present one are set forth in the court rules. MCR 7.205. That Court may grant or deny the application; enter a final decision; grant other relief; request additional material from the record; or require a certified concise statement of proceedings and facts from the court, tribunal, or agency whose order is being appealed.

The Michigan Supreme Court has described in detail the history of the framework for appeals from guilty pleas in Michigan. *People v Bulger*, 462 Mich 495, 503-506; 614 NW2d 103 (2000) *cert denied*, 531 US 994 (2000)(holding that neither the Michigan Constitution nor the United States Constitution requires the appointment of appellate counsel at public expense when a criminal defendant applies for leave to appeal a plea-based conviction).

The challenged statute, MCL 770.3a, became effective April 1, 2000.[6] It provides that "a defendant who pleads guilty . . . shall not have appellate counsel appointed for review of the

[5] The circuit courts are the trial courts of general jurisdiction, including jurisdiction over felonies and appellate jurisdiction over lower courts. Mich Const 1963, art VI, § 13; MCL 600.601.

[6] Because MCL 770.3a did not apply to the defendant in *Bulger*, the precise question of its constitutionality was not before the Michigan Supreme Court, but the Court explicitly upheld the constitutionality of the practice of denying appointed counsel. In *People v Harris*, 470 Mich. 882; 681 NW 2d 653 (2004) the Court relied on *Bulger* and declared MCL 770.3a constitutional.

defendant's conviction or sentence." MCL 770.3a(1). Four exceptions specify that appellate counsel must be appointed when the prosecution seeks leave to appeal; when the defendant's sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines; when the appellate court grants the defendant's application for leave; and when the defendant seeks leave to appeal a conditional plea. MCL 770.3a(2). Additionally, appellate counsel may be appointed in one other circumstance when three factors are present: the defendant seeks leave to appeal a sentence based upon allegedly improper scoring of offense or prior record variables; the defendant preserved an objection to the scoring; and the sentence constitutes an upward departure from the upper limit of the minimum sentence range. MCL 770.3a(3).

REASONS FOR DENYING THE PETITION

The petition raises two issues, neither of which warrants certiorari. The first is an allegation that petitioner has a federal constitutional right to appointed appellate counsel to help prepare an application for leave to appeal for a discretionary appeal to the Michigan Court of Appeals from his pleas of nolo contendere. Although this is an important issue, this Court need not grant certiorari to review it, because it was correctly decided by the Michigan trial court and the Michigan appellate courts denied leave to appeal without ruling on it, and because the issue is already pending in another case. The United States Court of Appeals for the Sixth Circuit held, contrary to the Michigan Supreme Court in *Bulger*, *supra*, 462 Mich 495 and *Harris*, *supra*, 470 Mich 882, that MCL 770.3a was unconstitutional. *Tesmer v Kowalski*, 333 F 3d 683 (6th Cir., 2003). This Court granted the State's petition for certiorari in that case and the issue is now pending in *Kowalski v Tesmer*, No. 03-407 (oral argument scheduled for October 4, 2004).

The second issue raised in the petition is whether petitioner received the effective assistance of counsel from his retained counsel in the trial court. This Court should not grant certiorari on this issue because it presents no important question of federal law and there is no conflict with other decisions. It is exclusively dependent on the unique facts of this case, the claim is without merit, it was correctly decided by the trial court, and the Michigan appellate courts denied leave to appeal without considering the merits of the issue.

I. There Is No Constitutional Right To Appointed Counsel In Discretionary Appeals From Guilty Plea Convictions.

Although there is no constitutional right to an appeal, *McKane v Durston*, 153 US 684 (1894), this Court has held that if a State grants a right to a first appeal on the merits, then it

generally cannot deny appointed counsel to an indigent. *Douglas v California*, 372 US 353, 357 (1963)("where the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor" (emphasis in original)).

By contrast, this Court has also held that after an initial first appeal by right to an intermediate State court of appeals, the Constitution does not require appointment of appellate counsel for a subsequent discretionary appeal to a State supreme court. *Ross v Moffitt*, 417 US 600, 610, 612 (1974). A discretionary appeal from a guilty plea conviction in Michigan, in all relevant respects, more closely resembles *Moffitt* than *Douglas*. Accordingly, MCL 770.3a is constitutional.

The Sixth Amendment right to counsel applies to criminal prosecutions, not appeals, so the right to an attorney on appeal has been analyzed under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and not the Sixth Amendment.[7] *Ross v Moffitt, supra*, 417 US at 608-609 ("The precise rationale for the *Griffin*[*v Illinois*, 351 US 12 (1956)] and *Douglas* lines of cases has never been explicitly stated. some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment."); *Smith v Robbins, supra*, 528 US at 276 ("But our case law reveals that, as a practical matter, the two clauses largely converge to require that a State's procedure "afford adequate and effective appellate review to indigent defendants," *Griffin*, 351 US at 20 (plurality opinion).").

[7] US Const, Amend XIV: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In *Ross v Moffitt* this Court described the framework for analyzing whether an indigent criminal defendant has a constitutional right to appellate counsel, 417 US at 612, 616:

> The Fourteenth Amendment does not require absolute equality or precisely equal advantages, nor does it require the State to equalize economic conditions. It does require that the state appellate system be free of unreasoned distinctions, and that indigents have an adequate opportunity to present their claims fairly within the adversary system.
>
> * * *
>
> The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process. [Citations and internal quotation marks omitted.]

The Michigan appellate system makes a distinction between appeals from convictions based on trials, which are by right, and appeals from convictions based on guilty pleas, which are discretionary. Because this distinction is based on legitimate and permissible differences between trials and guilty pleas, the Michigan appellate system is "free of unreasoned distinctions." Furthermore, because of protections built into the guilty plea system, petitioner Halbert had "an adequate opportunity to present [his] claims fairly" and receive a meaningful appeal without appointed appellate counsel.

A. There Are Reasoned Distinctions Between Appeals From Convictions After Trials And Appeals From Guilty Plea Convictions

Convictions by guilty pleas are advantageous to both defendants and the government, and are a major aspect of the criminal justice system. *Brady v United States*, 397 US 742, 752 (1970) (describing advantages and noting that "well over three-fourths of the criminal convictions in this country rest on pleas of guilty"). In *Tollett v Henderson*, 411 US 258, 267 (1973) this Court recognized unique aspects of guilty pleas:

> [A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that

> he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

In Michigan, extensive protections are in place to assure that guilty pleas are voluntary, intelligent, and accurate. MCR 6.302. The purpose of these elaborate guilty plea procedures is to make sure the record reflects "'that the defendant was informed of such constitutional rights and incidents of a trial as reasonably to warrant the conclusion that he understood what a trial is and that by pleading guilty he was knowingly and voluntarily giving up his right to a trial and such rights and incidents.'" *People v Saffold*, 465 Mich 268, 271; 631 NW2d 320 (2001) quoting *In re Guilty Plea Cases*, 395 Mich 122; 235 NW2d 132 (Mich 1975). In reversing a lower court determination that a guilty plea was not voluntary, this Court recently said: "The law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances -- even though the defendant may not know the *specific detailed* consequences of invoking it." *United States v Ruiz*, 536 US 622, 629 (2002) (emphasis in original).

The Michigan court rule specifically requires that the trial court "speak[] directly to the defendant," the prosecutor, and the defendant's attorney to assure that the defendant is fully informed and fully understands that by pleading guilty he is giving up many rights, specifically including the right to appeal and the right to appointed counsel on any discretionary appeal. MCR 6.302(B)(5), (6). See *Iowa v Tovar*, 541 US ___; 124 S Ct 1379, 1383; 158 L Ed 2d 209, 215 (2004)(holding that the Sixth Amendment "is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea"). Petitioner Halbert was fully informed of the consequences of his pleas, including the fact that he was

giving up the right to appointed counsel on appeal, see Plea Transcript, Resp App. 24b - 25b. His pleas constitute a valid waiver of any right to appointed appellate counsel.

These distinctions between trials and guilty pleas are legitimate and permissible, and support Michigan's decision to treat the respective appeals differently.

B. Petitioner Had An Adequate Opportunity To Present His Claims Fairly And Receive A Meaningful Appeal.

In discretionary first appeals from guilty plea convictions in Michigan, the defendant will have sufficient materials available to permit him to present his claims fairly and thus receive a meaningful appeal. As an indigent criminal defendant, petitioner was entitled to, and received, free copies of court documents, including transcripts. MCR 6.433. The transcript , together with the "nontechnical and easily understood" form produced by the State Court Administrative Office as required by the statute, MCL 770.3a(4), permitted petitioner to present his claims in a "lawyerlike fashion" as contemplated by *Ross v Moffitt*, 417 US at 615, even without counsel. It is apparent that petitioner was aware of the then-ongoing federal litigation in *Tesmer v Kowalski*, as he cited the District Court and initial Court of Appeals panel decision in his Michigan applications for leave to appeal. Petitioner's claims were presented to the Michigan appellate courts sufficiently to enable them to determine whether to grant the discretionary leave to appeal. Although the Michigan Court of Appeals and Michigan Supreme Court were sufficiently apprised of the issues, both courts exercised their discretion and denied leave to appeal.

C. Orders Of The Michigan Court Of Appeals Denying Applications For Leave To Appeal Are Discretionary And Are Not Decisions On The Merits Of The Legal Issues.

Beginning at least with *Griffin v Illinois*, 351 US 12 (1956) (holding that when a transcript of trial court proceedings is necessary for full direct appellate court review of the

merits, the Constitution requires a State to provide the transcript to an indigent), and continuing through *Douglas v California, supra*, 372 US 353, and *Ross v Moffitt, supra*, 417 US 600, this Court has recognized a distinction between direct appellate review by right of the merits of legal issues, and discretionary appellate review, which involves evaluation of other factors. An indigent defendant is generally entitled to counsel in a first appeal by right on the merits because such an appeal is important to "a correct adjudication of guilt or innocence," and is "an integral part of the . . . trial system for finally adjudicating the guilt or innocence of a defendant," *Griffin, supra*, 351 US at 18. Counsel is required "where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot," *Douglas, supra*, 372 US at 357, and where the appeal on the merits is "the final step in the adjudication of guilt or innocence of the individual," *Evitts v Lucey*, 469 US 387, 404 (1985) (holding that in a first appeal of right on the merits, defendants are entitled not just to counsel, but to the effective assistance of counsel).

In *Ross v Moffitt, supra*, 417 US at 615, this Court recognized that "the function served by discretionary review" is different from direct review of the merits, and involves different constitutional considerations. Counsel was not constitutionally required, in part because that discretionary appeal did not depend on whether a correct adjudication of guilt had been reached below. Rather, it was based on other factors like "whether 'the subject matter of the appeal has significant public interest,' whether 'the cause involves legal principles of major significance to the jurisprudence of the State,' or whether the decision below is in probable conflict with a decision of the [State] Supreme Court." 417 US at 615. The exercise of discretion by the Michigan Court of Appeals in deciding whether to grant leave to appeal is similar, even though

the court rules do not explicitly provide such criteria (unlike the criteria specified for applications to the Michigan Supreme Court, see MCR 7.302(B)).

Convictions on guilty pleas in Michigan are, in a very real sense, "the final step in the adjudication of guilt or innocence of the individual," *Evitts v Lucey*, 469 US at 404. Appeals from guilty pleas in Michigan—whether with or without counsel—are discretionary. In ruling on applications for leave to appeal, the Michigan Court of Appeals is typically not deciding the merits of the legal issues presented; it is only deciding whether the issues have sufficient merit to deserve substantive consideration. The Michigan Court of Appeals may grant or deny the application for leave to appeal; enter a final decision; grant other relief; request additional material from the record; or require a certified statement of proceedings and facts from the lower court. If an application is granted, counsel is appointed and the case proceeds as an appeal of right. MCR 7.205(D)(2), (3); MCL 770.3a(2)(c).

When the Michigan Court of Appeals enters an order denying leave to appeal it often uses the following boilerplate language: "The Court orders that the application for leave to appeal is DENIED for lack of merit in the grounds presented." This boilerplate language does not mean that the Michigan Court of Appeals is deciding the substantive merits of legal claims. It means no more than that the reasons presented to justify the grant of leave to appeal were insufficient to persuade the Court to exercise its discretion and accept the appeal. Well-established Michigan case law demonstrates that this language does not mean that the Michigan Court of Appeals reviewed the substantive merits of any particular issue.

Orders by both the Michigan Supreme Court and the Michigan Court of Appeals denying discretionary applications for leave to appeal are not decisions on the merits. In *Great Lakes Realty Corp v Peters*, 336 Mich 325, 328-329; 57 NW 2d 901 (1953), the Michigan Supreme

Court quoted from *Malooly v York Heating & Ventilating Corp.*, 270 Mich 240, 247; 258 NW 622 (1935) and said: "The denial of an application for leave to appeal is ordinarily an act of judicial discretion equivalent to the denial of certiorari. It is held that the denial of the writ of certiorari is not equivalent of an affirmation of the decree sought to be reviewed. [Citations omitted]."

In *People v Berry*, 10 Mich App 469, 473-474; 157 NW 2d 310 (1968) the Michigan Court of Appeals cited and quoted *Peters*, *Malooly*, and another case, and held that it was not barred from reviewing the merits of an issue even though an application for leave to appeal had previously been denied:

> All three cases involved denials of applications for leave to appeal from interlocutory orders. However, the principle . . . is equally applicable to denials of applications for leave to appeal from final judgments. Such denials are acts of judicial discretion and do not constitute affirmances on the merits.
>
> * * *
>
> [D]enials of applications for leave to appeal do not import an expression of opinion on the merits of a cause, but rather are acts of judicial discretion. For this reason such denials cannot be afforded res judicata treatment. This Court is not barred from looking into the merits of the present cause. [Citations omitted.]

Even more conclusively, in *State ex rel Saginaw* Prosecuting *Attorney v Bobenal Invest, Inc*, 111 Mich App 16, 22 n 2; 314 NW 2d 512 (1981), *lv den* 414 Mich 951 (1982), the Michigan Court of Appeals held that two previous orders that denied applications for leave to appeal "for lack of merit in the grounds presented" were not adjudications on the merits.[8] Therefore the doctrines of res judicata and law of the case did not apply: "By denying the

[8] Defaults had been entered against two parties, and the trial court denied motions to set them aside. The parties appealed separately, and the applications for leave to appeal were denied by the Michigan Court of Appeals on April 4, 1980 (Mich App Docket No. 50540) and April 8, 1980 (Mich App Docket No. 50736). Both orders contained the form language: "IT IS FURTHER ORDERED that the application for leave appeal be, and the same is hereby DENIED for lack of merit in the grounds presented."

interlocutory applications for leave to appeal neither this Court, nor the Supreme Court, ruled on the merits of the challenges to the legal sufficiency of plaintiff's complaint."

In *People v Tooson*, (*In re Withdrawal of Attorney*), 231 Mich App 504, 505-506; 231 NW 2d 504 (1998), an appeal from a guilty plea, the Michigan Court of Appeals held that only the trial court, and not the Court of Appeals, had jurisdiction over an appointed appellate attorney's motion to withdraw based on lack of meritorious issues on appeal:

> When an application for leave to appeal is filed, this Court's jurisdiction is limited to granting an application, denying it, or awarding peremptory relief. MCR 7.205(D)(2), 7.215(A). Plenary jurisdiction attaches only after leave is granted. MCR 7.205(D)(3). Only if and when leave is granted does this Court actually possess plenary power over this class of cases.

Similarly, under the Michigan Court Rules, orders of the Michigan Court of Appeals denying leave to appeal do not fall within the criteria for publication, MCR 7.215(B); are not precedentially binding under the rule of *stare decisis*, MCR 7.215(C); are not even within the definition of "judgments" of the Court; and are "not deemed to dispose of an appeal" for purposes of execution, enforcement, and timing of subsequent events. MCR 7.215(E)(1).[9]

[9] MCR 7.215:
* * *
(B) Standards for Publication. A court opinion must be published if it:
(1) establishes a new rule of law;
(2) construes a provision of a constitution, statute, ordinance, or court rule;
(3) alters or modifies an existing rule of law or extends it to a new factual context;
(4) reaffirms a principle of law not applied in a recently reported decision;
(5) involves a legal issue of continuing public interest;
(6) criticizes existing law; or
(7) creates or resolves an apparent conflict of authority, whether or not the earlier opinion was reported; or
(8) decides an appeal from a lower court order ruling that a provision of the Michigan Constitution, a Michigan Statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid.
(C) Precedent of Opinions.
(1) An unpublished opinion is not precedentially binding under the rule of stare decisis. * * *
(2) A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis. * * *
* * *
(E) Judgment.

Federal habeas corpus courts have also considered the question of whether orders from the Michigan Court of Appeals denying leave to appeal are decisions on the merits of the legal issues. Federal habeas review of a State court's decision is governed by the standards established by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub L No 104-132, 110 Stat 1214 (1996). Under the AEDPA, an application for writ of habeas corpus on behalf of a person who is incarcerated pursuant to a state conviction cannot be granted with respect to any claim that was "adjudicated on the merits in State court proceedings" unless the adjudication: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 USC § 2254(d).

In *McKenzie v Smith*, 326 F 3d 721, 727 (6th Cir., 2003), *cert denied*, 540 US ___; 124 S Ct 1145 (2004) the Court considered an order of the Michigan Court of Appeals denying an application for leave to appeal in the form language, "for lack of merit in the grounds presented" and said, "there are simply no results, let alone reasoning, to which this court can defer. Without such results or reasoning, any attempt to determine whether the state court decision 'was contrary to, or involved an unreasonable application of clearly established Federal law,' 28 USC § 2254(d)(1), would be futile." The Court therefore declined to apply any deference to the State court order and instead applied de novo review and granted relief, thus demonstrating that it did not consider the Michigan Court of Appeals form order to be a disposition on the merits.

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(1) When the Court of Appeals disposes of an original action or an appeal, whether taken as of right, by leave granted, or by order in lieu of leave being granted, its opinion or order is its judgment. An order denying leave to appeal is not deemed to dispose of an appeal.

Years earlier, in *Raper v Mintzes*, 706 F 2d 161, 164 (6th Cir., 1983), the Court considered the effect of an order denying leave to appeal "for lack of merit in the grounds presented" and said, "The order appears to be a standard form denial of leave to file a delayed appeal and gives no indication as to the basis for the decision. In this context, the state court's use of the word 'merit' in its order does not conclusively establish that the decision was based on the merits." *Contra, Abela v Martin*, ___ F 3d ___; 2004 U.S. App. LEXIS 18210 (6th Cir., 2004).

Michigan has chosen to address the burdens on its appellate court system, in part, by imposing limits on appeals from guilty pleas. It may constitutionally do so since its process provides "adequate and effective appellate review to indigent defendants." *Griffin v Illinois*, 351 US at 20. A State "may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent." *Griffin*, 351 US at 24 (opinion of Justice Frankfurter, concurring in judgment). States are laboratories of federalism that are free, within the limits of the Constitution, to experiment with procedures for handling criminal appeals, *Smith v Robbins*, *supra*, 528 US at 276 ("We will not cavalierly 'impede the States' ability to serve as laboratories for testing solutions to novel legal problems'" (citation omitted.)).

The system Michigan has chosen for appeals from guilty pleas complies with the Constitution. Petitioner was able to present his issues effectively to the Michigan appellate courts, although those courts chose not to rule on them.

II. Petitioner Was Not Deprived Of The Effective Assistance Of Counsel When His Retained Trial Counsel Did Not Object To The Scoring Of "Prior Record Variables" And "Offense Variables" In Determining The Proper Minimum Sentence Range Under The Michigan Sentencing Guidelines.

Under Michigan's indeterminate sentencing framework, the maximum sentences are set by statute and the minimum sentence ranges are determined by using the Michigan Sentencing Guidelines. The presentencing investigation report included a Sentencing Information Report (Petitioner's Appendix I and J) for each offense prepared according to the Guidelines. Excerpts from the Michigan Sentencing Guidelines Manual, 2001 Edition are attached at Resp. App. 29b. The two crimes to which Petitioner pleaded, Criminal Sexual Conduct in the Second Degree, each have a statutory maximum penalty of 15 years imprisonment. MCL 750.520c(2). For purposes of the establishing the minimum sentence under the Guidelines, these crimes are classified as Class C Crimes Against a Person. Prior Record Variables (PRV) and Offense Variables (OV) are evaluated for each offense and assigned numerical values. These numerical values are then compared against a grid, Resp App. 56b, to determine the minimum sentence range.

In *People v Morson*, ___ Mich ___; 2004 Mich. LEXIS 1692 (2004) the Michigan Supreme Court described the operation of the sentencing guidelines:

> Generally, to determine a minimum sentence range under the legislative sentencing guidelines, the sentencing court must first determine the offense category. MCL 777.21(1)(a). The sentencing court must then determine which offense variables (OV) are applicable, score those variables, and total the points to determine the offender's offense variable level. *Id.* The sentencing court also scores all prior record variables. MCL 777.21(1)(b). The offender's offense variables score and prior record variables score are then used with the sentencing grids to determine the recommended minimum sentence range under the guidelines. MCL 777.21(1)(c).

Although petitioner and his counsel affirmed their agreement with the entire presentence report and sentencing guidelines recommended minimum sentences, Resp. App. 58b-59b, he now alleges that some variables were scored incorrectly in computing the minimum sentence ranges, and that his counsel's failure to object constituted ineffective assistance of counsel. In *Strickland v Washington*, 466 US 668, 687-694 (US, 1984) this Court held that in a claim of ineffective assistance of counsel two elements must be established, deficient performance and prejudice:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.
>
> * * *
>
> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

In *Glover v United States*, 531 US 198 (2001) this Court considered a claim of ineffective assistance of counsel in the failure to object to an error in a Federal Sentencing Guidelines determination (a determinate system of sentencing, unlike Michigan's indeterminate sentence guidelines for determining the range of the minimum sentence) that increased the defendant's prison sentence by at least 6 months and perhaps by 21 months. The Court held that such an error can satisfy the prejudice prong of the test, but might not satisfy the deficient performance prong, 531 US at 204:

> Although the amount by which a defendant's sentence is increased by a particular decision may be a factor to consider in determining whether counsel's performance in failing to argue the point constitutes ineffective assistance, under a

determinate system of constrained discretion such as the Sentencing Guidelines it cannot serve as a bar to a showing of prejudice.

If Petitioner's sentence guidelines were scored incorrectly, and if he received a longer minimum sentence because of the error, his statutory maximum sentence would not be affected but his parole eligibility date might be affected. In Michigan, prisoners serving consecutive sentences become subject to the jurisdiction of the parole board at the expiration of their combined minimum terms. MCL 791.234 (4).[10]

Petitioner thus has made a claim that satisfies the prejudice prong of the test for ineffective assistance of counsel. Petitioner cannot satisfy the deficient performance prong, however, because any error in the scoring did not have any effect on the range of minimum sentences under the guidelines.

Docket No. 00-019193

For Docket No.00-019193, the total PRV was zero, and the total OV was 45 (OV 9, "Number of Victims" (three) = 10 points; OV 10, "Exploitation of a Vulnerable Victim" (youth) = 10 points; OV 13, "Continuing Pattern of Criminal Behavior" (three or more crimes against a person) = 25 points). Application of these values to the grid for this Crime Class yielded a Guideline Minimum Range of 12 to 24 months. Petitioner alleges that OV 9 and OV 13 were scored incorrectly. Respondent submits that OV 13 was scored correctly and although it appears that OV 9 may have been scored incorrectly, any error did not have any impact on the ultimate scoring for determining the minimum sentence range.

---

[10] MCL 791.234(4):

If a prisoner subject to disciplinary time is sentenced for consecutive terms, whether received at the same time or at any time during the life of the original sentence, the parole board has jurisdiction over the prisoner for purposes of parole when the prisoner has served the total time of the added minimum terms. The maximum terms of the sentences shall be added to compute the new maximum term under this subsection, and discharge shall be issued only after the total of the maximum sentences has been served, unless the prisoner is paroled and discharged upon satisfactory completion of the parole.

OV 13 evaluates a continuing pattern of criminal behavior. MCL 777.43(1)(b) provides that 25 points shall be awarded if "The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(2)(a) provides instructions in scoring this variable, "For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." See Sentencing guidelines manual, p 32, that mirrors this statutory language. Resp. App. 51b. Petitioner's allegation of error is that his nolo plea in this docket was only for a single victim, so he should not have received the points. The statute and guidelines use the phrase "crimes against a person" to define the offense category, MCL 777.5, and distinguish it from other categories such as crimes against property or crimes involving a controlled substance. It does not mean that only crimes against one particular person can be counted. His argument disregards the explicit statutory and guidelines language that provides that all crimes within a 5-year period, regardless of whether they resulted in conviction "shall be counted." *People v McDaniel*, 256 Mich App 165; 662 NW 2d 101 (2003)(even a 5-year period that does not include the sentencing offense may be counted under OV 13). There was no error in scoring OV 13, and no ineffective assistance of counsel in failing to object.

Under OV 9, MCL 777.39, Petitioner was apparently given a score of 10 because there were three offenses and three separate victims in the original charges. He asserts that OV 9 must be scored only with respect to single victim in the count to which he pleaded, and not the other victims in the other counts. Michigan published appellate decisions are not entirely clear on this precise issue. In *People v Raby*, 218 Mich App 78, 81; 554 NW 2d 25 (1996), *aff'd on other grounds*, 456 Mich. 487; 572 N.W.2d 644 (1998) the Michigan Court of Appeals discussed a judicial sentence guideline (a precursor to the current statutory guidelines) pertaining to criminal

sexual penetration, resolved a conflict in previous decisions, and held that evidence of prior penetrations with the victim could be considered. The Michigan Supreme Court said that it had "no disagreement with that conclusion," and affirmed the sentence, but held that those judicial guidelines were not themselves subject to appellate review since they were not required by law. 456 Mich 496, 499. There is other authority, however, that supports Petitioner's current contention. In *People v Chesebro*, 206 Mich App 468, 471-472; 522 NW 2d 677 (1994) the Court discussed another judicial sentence guideline, and said:

> We think the rule that more accurately applies the sentencing guidelines is that the offense variables are to be scored only with respect to the specific criminal transaction that gives rise to the conviction for which the defendant is being sentenced unless the instructions for a variable specifically and explicitly direct the trial court to do otherwise.

Even if Petitioner is correct, it would not change the overall recommended minimum sentence range. Petitioner received a total PRV score of 0 and an OV score of 45, which placed him in Offense Level IV (35-49 points) with a recommended minimum sentence range of 12-24 months. MCL 777.64; Sentence Guideline Manual, p. 97; Resp. App. 56b. If OV 9 should have been scored at 0 instead of 10, he would have a total OV score of 35, which would have placed him in the same Offense Level, and he would have received the same recommended minimum sentence range. Any scoring error thus had no impact on the recommended minimum sentence range and was harmless. *People v Johnson*, 202 Mich App 281, 290; 508 NW 2d 509 (1993). Any error by counsel therefore does amount to deficient performance and petitioner was not deprived of the effective assistance of counsel.

Docket No. 01-020597

For Docket No. 01-020597, the total PRV was 20 (PRV 6, "Relationship to the Criminal Justice System" (offender on bond awaiting adjudication or sentencing for a felony) = 10 points;

PRV 7, "Subsequent or Concurrent Felony Convictions" (offender has one subsequent or concurrent conviction) = 10 points). The total OV value was 45 (OV 4 "Psychological Injury to a Victim" (serious psychological injury) = 10 points; OV 10, "Exploitation of a Vulnerable Victim" (youth) = 10 points; OV 13, "Continuing Pattern of Criminal Behavior" (three or more crimes against a person) = 25 points). Application of these values to the grid for this Crime Class yielded a Guideline Minimum Range of 29 to 57 months. Petitioner challenges the scoring of PRV 7 and OV 13, but there was no error in either scoring.

With respect to OV 13, Petitioner makes the same challenge as in Docket No. 00-019193, and it fails for the reasons discussed above.

With respect to PRV 7, MCL 777.54, ten points were scored for having one subsequent or concurrent felony conviction. MCL 777.54(2)(a) provides: "Score the appropriate point value if the offender was convicted of multiple felony counts or was convicted of a felony after the sentencing offense was committed." See Sentence Guidelines Manual, p. 27; Resp. App. 46b. Petitioner argues that because the offense to which he pleaded in docket no. 00-019193 was committed prior to the offense to which he pleaded in docket no. 01-020597, no points should have been scored. His contention flies in the face of the plain language of the statute and guideline. He was in fact convicted of "multiple felony counts," and he was "convicted of a felony [in docket 00-019193, regardless of when that offense was committed] after the sentencing offense [in docket 01-020597] was committed." There was no error in scoring.

Even if Petitioner is correct that there was an error in scoring, it would not change the overall recommended minimum sentence range. Petitioner received a total PRV score of 20 and an OV score of 45, which placed him in Prior Record Variable Level C (10-24 points) and Offense Level IV (35-49 points) with a recommended minimum sentence range of 29-57 months.

MCL 777.64; Sentence Guideline Manual, p. 97; Resp App. 56b. If PRV 7 should have been scored at 0 instead of 10, he would have a total PRV score of 10 which would have placed him in the same Prior Record Variable Level, and he would have received the same recommended minimum sentence range. Any scoring error thus had no impact on the recommended minimum sentence range and was harmless. *People v Johnson*, 202 Mich App 281, 290; 508 NW 2d 509 (1993). Any error by counsel therefore does amount to deficient performance and petitioner was not deprived of the effective assistance of counsel.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Michael A. Cox
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
Telephone: (517) 373-1124

Dated: September, 2004

APPENDIX

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Approved,SCAO

Original - Court
1st copy - Corrections
2nd copy - Corrections (for return)
3rd copy - State Police
4th copy - Defendant
5th copy - Prosecutor

STATE OF MICHIGAN 10TH JUDICIAL CIRCUIT SAGINAW COUNTY	JUDGMENT OF SENTENCE COMMITMENT TO CORRECTIONS DEPARTMENT	CASE NO. 00-019193-FH-2

ORI MI- 1730015 J
Police Report No.

Court address: 111 S. MICHIGAN AVE., SAGINAW, MICHIGAN

Court telephone no.: (517) 790-5471

THE PEOPLE OF THE STATE OF MICHIGAN

V

Defendant's name, address, and telephone no.
HALBERT, ANTONIO DWAYNE
2545 BEWICK
SAGINAW, MI 48601

CTN	SID	DOB
73-00-004569-01		12/30/67

Prosecuting attorney name	Bar no.
Michael D. Thomas	P23539

Defendant attorney name	Bar no.
O'FARRELL, RODNEY J.	P24899

THE COURT FINDS:

1. The defendant, represented by counsel, was found guilty on 11/7/01 (Date) of the crimes stated below:

Plea: insert "G" for guilty plea; "NC" for nolo contendere; "MI" for guilty but mentally ill. * Use "X" if sentence is to be enhanced because of Habitual Offender Act.

Count	CONVICTED BY Plea*	Court*	Jury	CRIME	CHARGE (CODE(S) MCL citation/PACC Code
1	NC			2ND DEG CSC-U/13	750.520C1A

☐ 2. The conviction is reportable to the Secretary of State under MCL 257.732 or MCL 281.1040.
The defendant's driver license number is: _____

☐ 3. HIV testing was ordered on 12/10/2001 (Date). Confidential test results are on file.

IT IS ORDERED:

4. Defendant is sentenced to custody of Michigan Department of Corrections. This sentence shall be executed immediately.

Count	SENTENCE DATE	MINIMUM Years	MINIMUM Mos.	MINIMUM Days	MAXIMUM Years	MAXIMUM Mos.	DATE SENTENCE BEGINS	JAIL CREDIT Mos.	JAIL CREDIT Days	OTHER INFORMATION
1	12/10/01		24		15		12/10/01		164	PRIOR TO & CONSECUTIVE
										W/01-20597-FH-2

☐ Defendant shall pay restitution of $ _____. If a cash bond/bail was personally posted by the defendant, payment toward restitution is to first be collected out of that bond/bail and allocated as specified under MCL 775.22.

☐ 5. Sentence(s) to be served consecutively to:
☐each other. ☐case numbers 01-20597-FH-2

6. Defendant shall pay a $60.00 assessment for the Crime Victim Rights Fund.

7. Court recommendation:

☐ 8. Defendant shall pay a $150.00 assessment for forensic lab test.

12/11/01 (Date)

Judge ROBERT L. KACZMAREK — P15639 (Bar no.)

Under MCL 769.16a the clerk of the court shall send a copy of this order to the Michigan State Police Central Records Division to create a criminal history record.

I certify that this is a correct and complete abstract from the original court records. The sheriff shall, without needless delay, deliver defendant to the Michigan Department of Corrections at a place designated by the department.

(SEAL)

Deputy court clerk

MCL 765.15(2); MSA 28.902(2), MCL 769.16a; MSA 28.1086(1), MCL 775.22; MSA 28.1259, MCL 780.766; MSA 28.1287(766)

CC 219b (6/98) **JUDGMENT OF SENTENCE, COMMITMENT TO CORRECTIONS DEPARTMENT** MCR 6.427(A)

1b

539Lc1

Approved,SCAO

Original - Court
1st copy - Corrections
2nd copy - Corrections (for return)
3rd copy - State Police
4th copy - Defendant
5th copy - Prosecutor

STATE OF MICHIGAN 10TH JUDICIAL CIRCUIT SAGINAW COUNTY	JUDGMENT OF SENTENCE COMMITMENT TO CORRECTIONS DEPARTMENT	CASE NO. 01-020597-FH-2

ORI MI- 1730015 J
Police Report No.

Court address: 111 S. MICHIGAN AVE., SAGINAW, MICHIGAN

Court telephone no.: (517) 790-5471

THE PEOPLE OF THE STATE OF MICHIGAN

V

Defendant's name, address, and telephone no.
HALBERT, ANTONIO DWAYNE
1602 WALNUT
SAGINAW, MI 48601

CTN	SID	DOB
73-01-004748-01		12/30/67

Prosecuting attorney name	Bar no.
Michael D. Thomas	P23539

Defendant attorney name	Bar no.
O'FARRELL, RODNEY J.	P24899

THE COURT FINDS:

1. The defendant, represented by counsel, was found guilty on 11/7/01 (Date) of the crimes stated below:

Plea: insert "G" for guilty plea; "NC" for nolo contendere; "MI" for guilty but mentally ill. * Use "X" if sentence is to be enhanced because of Habitual Offender Act.

Count	CONVICTED BY Plea*	Court*	Jury	CRIME	CHARGE (CODE(S) MCL citation/PACC Code
1	NC			CSC 2ND DEGREE-RELAT	750.520C1B

☐ 2. The conviction is reportable to the Secretary of State under MCL 257.732 or MCL 281.1040.
The defendant's driver license number is: _____

☐ 3. HIV testing was ordered on 12/10/01 (Date). Confidential test results are on file.

IT IS ORDERED:

4. Defendant is sentenced to custody of Michigan Department of Corrections. This sentence shall be executed immediately.

Count	SENTENCE DATE	MINIMUM Years	MINIMUM Mos.	MINIMUM Days	MAXIMUM Years	MAXIMUM Mos.	DATE SENTENCE BEGINS	JAIL CREDIT Mos.	JAIL CREDIT Days	OTHER INFORMATION
1	12/10/01		57		15		12/10/01		0	CONSECUTIVE W/00-19193FH2

☐ Defendant shall pay restitution of $ _____. If a cash bond/bail was personally posted by the defendant, payment toward restitution is to first be collected out of that bond/bail and allocated as specified under MCL 775.22.

☒ 5. Sentence(s) to be served consecutively to:
☐each other. ☐case numbers 00-19193-FH-2

6. Defendant shall pay a $60.00 assessment for the Crime Victim Rights Fund.

7. Court recommendation:

☐ 8. Defendant shall pay a $150.00 assessment for forensic lab test.

12/11/01 (Date)

Judge ROBERT L. KACZMAREK — P15639 (Bar no.)

Under MCL 769.16a the clerk of the court shall send a copy of this order to the Michigan State Police Central Records Division to create a criminal history record.

I certify that this is a correct and complete abstract from the original court records. The sheriff shall, without needless delay, deliver defendant to the Michigan Department of Corrections at a place designated by the department.

(SEAL)

Deputy court clerk

MCL 765.15(2); MSA 28.902(2), MCL 769.16a; MSA 28.1086(1), MCL 775.22; MSA 28.1259, MCL 780.766; MSA 28.1287(766)

CC 219b (6/98) **JUDGMENT OF SENTENCE, COMMITMENT TO CORRECTIONS DEPARTMENT** MCR 6.427(A)

2b

2780-00

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

THE PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff,

File No. 01-019193-FH-2
Judge Robert L. Kaczmarek

V
ANTONIO DEWAYNE HALBERT
Defendant.

ORDER DENYING DEFENDANT'S REQUEST FOR APPOINTMENT
OF COUNSEL TO FILE APPLICATION FOR LEAVE TO APPEAL

At a session of said Court, held in the Courthouse in the City and County of Saginaw, State of Michigan, on the 27 day of December, 2001

PRESENT: HONORABLE Robert L. Kaczmarek, Circuit Court Judge

In this cause, defendant has filed a request for a court appointed attorney to assist him in filing an Application for Leave to Appeal to the Court of Appeals following a voluntary plea.

The Court denies appointment of an attorney at public expense for the following reasons:

☐ 1. The defendant does not have a constitutional or statutory right to appointment of appellate counsel to pursue a discretionary appeal. People v Bulger, 462 Mich 495 (2000), cert den 121 SCt 486.

☐ 2. The defendant fails to set forth any meritorious issue as required by People v Najar, 229 Mich 393 (1998) .

☐ 3. The defendant's plea was not conditional.

☐ 4. The defendant's sentence was in accordance with the plea bargain.

☐ 5. The defendant specifically and voluntarily waived his right to have an attorney appointed at public expense to assist him in filing an application for Leave to Appeal or to assist with other post conviction remedies.

☐ 6. The defendant's sentence was within the sentencing guidelines.

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that defendant's petition for appointment of a court-appointed attorney to assist him in filing an Application for Leave to Appeal be and the same is denied.

Robert L. Kaczmarek

Robert L. Kaczmarek, Circuit Court Judge

I certify on this date I mailed a copy of this order denying appointment of counsel to defendant and prosecutor. I also mailed a copy of the defendant's request for appointment of counsel to the prosecutor.

DATE: 12-27-01

Vicki K. Nehan

JNN DENYCNC

A TRUE COPY
SUSAN [illegible] Clerk

Approved, SCAO

Original - Trial court
1st copy - Prosecutor
2nd copy - Defendant/Juvenile for
3rd copy - Defendant/Juvenile

STATE OF MICHIGAN 10TH JUDICIAL CIRCUIT SAGINAW COUNTY	NOTICE OF RIGHTS AFTER SENTENCING (AFTER PLEA OF GUILTY/ NOLO CONTENDERE) AND REQUEST FOR APPOINTMENT OF ATTORNEY	CASE NO. 00-19193-FH-2 Judge: R.L.KACZMAREK (I

Court address 111 SO. MICHIGAN AVE., SAGINAW, MI 48602 Court telephon

THE PEOPLE OF THE STATE OF MICHIGAN v Defendant/Juvenile name, address, telephone no., and date of b ANTONIO DEWAYNE HALBERT

NOTICE OF APPEAL RIGHTS Note to Court: This Notice must be given to the defendant/juvenile at sentencing

1. If you wish to appeal your plea or sentence, you may file an application for leave to appeal with the Court of Appeals.

2. If you request the appointment of an attorney and are found indigent, the court must appoint an attorney if: a) the prosecut attorney seeks leave to appeal; or b) your sentence exceeds the upper limit of the minimum sentence range of the applica sentencing guidelines; or c) the Court of Appeals or the Supreme Court grants your application for leave to appeal; or d) y seek leave to appeal a conditional plea under MCR 6.301(C)(2).

   If you request the appointment of an attorney and are found indigent, the court may appoint an attorney if: a) you seek lea to appeal a sentence based upon an alleged improper scoring of an offense variable or a prior record variable; and b) you object to the scoring or otherwise preserved the matter for appeal; and c) the sentence imposed by the court constitutes an upwa departure from the upper limit of the minimum sentence range that you allege should have been scored.

3. A request for the appointment of an attorney must be made in writing and sent directly to the court at the address noted abov within 42 days. The financial schedule on the back of this form must be completed.

RECEIPT OF NOTICE OF APPEAL RIGHTS AND APPLICATION FOR LEAVE TO APPEAL

On this day I received this form and financial schedule and an application for leave to appeal. I understand that I must return th completed Request for Appointment of Attorney to the court within 42 days if I want an attorney appointed for my appeal.

12 December 200 — Date

Antonio D Halbert — Signature of defendant/juvenile

REQUEST FOR APPOINTMENT OF ATTORNEY AND AFFIDAVIT OF INDIGENCY

I request appointment of an attorney to appeal my conviction. Conditions for my request are on the back of this form. The affidavit of indigency and financial schedule on the back of this form is submitted to show my financial condition.

☐ I request the court waive the filing fee for my application for leave to appeal.

12 December 200 — Date

Antonio D Halbert — Signature of defendant/juvenile

NOTE TO DEFENDANT/JUVENILE After completing the request for appointment of attorney and the affidavit of indigency and financial schedule, keep one copy for yourself and return the other copy to the court

AFFIDAVIT OF INDIGENCY AND FINANCIAL SCHEDULE

I request a court appointed attorney and submit the following information:

1. RESIDENCE ☐ Rent ☐ Own ☐ Live with parents ☐ Room/Board ☒ Prison _____ Number

2. MARITAL STATUS ☐ Single ☐ Married ☐ Divorced ☒ Separated ☐ Dependents: _____ Number

3. INCOME a. Employer name and address: None

b. Length of employment: N/A

c. Average of pay ☐ weekly ☐ monthly ☐ every two we Gross: $ _____ Net: $ _____

d. Other income (state monthly amount and source [DSS, VA, rent, pensions, spouse, unemployment, etc.]) If no income, state NONE.

None

4. ASSETS State value of car, home, bank deposits, inmate accounts, bonds, stocks, etc. If no assets, state NONE. Attach an account statement and certification for assets in prison accounts.

None

5. OBLIGATIONS Itemize monthly rent, installment payments, mortgage payments, child support, etc.

None

6. REIMBURSEMENT I understand that I may be ordered to reimburse the court for all or part of my attorney and defense cos

7. I pled guilty, guilty but mentally ill, or nolo contendere and
   ☐ a. my sentence exceeds the upper limit of minimum sentence range of the applicable sentencing guidelines. Therefore I am entitled to a court appointed attorney if the court finds me indigent.
   ☑ b. I seek leave to appeal a conditional plea made under MCR 6.301(C)(2). Therefore, I am entitled to a court appointed attorney if the court finds me indigent.
   ☑ c. I believe the offense variable or a prior record variable was improperly scored and I objected to the scoring at sentencin I state that the sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelin as I believe they should have been scored. Therefore, the court may appoint a court appointed attorney if the court fin me indigent.

Signature

Antonio Dwayne Halbert
Name (type or print)

Address

City, state, zip

Subscribed and sworn to before me on _____ Date _____ County, Michigan

3391-01

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

THE PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff,

File No. 01-020597-FH-2
Judge Robert L. Kaczmarek

V
ANTONIO DEWAYNE HALBERT
Defendant.

ORDER DENYING DEFENDANT'S REQUEST FOR APPOINTMENT
OF COUNSEL TO FILE APPLICATION FOR LEAVE TO APPEAL

At a session of said Court, held in the Courthouse in the City and County of Saginaw, State of Michigan, on the 26 day of December, 2001

PRESENT: HONORABLE Robert L. Kaczmarek, Circuit Court Judge

In this cause, defendant has filed a request for a court appointed attorney to assist him in filing an Application for Leave to Appeal to the Court of Appeals following a voluntary plea.

The Court denies appointment of an attorney at public expense for the following reasons:

☑ 1. The defendant does not have a constitutional or statutory right to appointment of appellate counsel to pursue a discretionary appeal. People v_ Bulger, 462 Mich 495 (2000), cert den 121 SCt 486.

☑ 2. The defendant fails to set forth any meritorious issue as required by People v_ Najar, 229 Mich 393 (1998) .

☑ 3. The defendant's plea was not conditional.

☑ 4. The defendant's sentence was in accordance with the plea bargain.

☑ 5. The defendant specifically and voluntarily waived his right to have an attorney appointed at public expense to assist him in filing an application for Leave to Appeal or to assist with other post conviction remedies.

☐ 6. The defendant's sentence was within the sentencing guidelines.

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that defendant's petition for appointment of a court-appointed attorney to assist him in filing an Application for Leave to Appeal be and the same is denied.

Robert L. Kaczmarek

Robert L. Kaczmarek, Circuit Court Judge

I certify on this date I mailed a copy of this order denying appointment of counsel to defendant and prosecutor. I also mailed a copy of the defendant's request for appointment of counsel to the prosecutor.

DATE: 12-27-01

Vickie K. Mahan

JNN DENYCNC

A TRUE COPY
SUSAN KNEVEVICH, Clerk

Approved, SCAO

Original - Trial court
1st copy - Prosecutor
2nd copy - Defendant/Juvenile for
3rd copy - Defendant/Juvenile

STATE OF MICHIGAN 10TH JUDICIAL CIRCUIT SAGINAW COUNTY	NOTICE OF RIGHTS AFTER SENTENCING (AFTER PLEA OF GUILTY/ NOLO CONTENDERE) AND REQUEST FOR APPOINTMENT OF ATTORNEY	CASE NO. 01-20597-FH-2 Judge: R.L.KACZMAREK (P

Court address 111 SO. MICHIGAN AVE., SAGINAW, MI 48602 Court telephon

THE PEOPLE OF THE STATE OF MICHIGAN v

Defendant/Juvenile name, address, telephone no., and date of b

ANTONIO DWAYNE HALBERT

NOTICE OF APPEAL RIGHTS Note to Court: This Notice must be given to the defendant/juvenile at sentencing

1. If you wish to appeal your plea or sentence, you may file an application for leave to appeal with the Court of Appeals.

2. If you request the appointment of an attorney and are found indigent, the court must appoint an attorney if: a) the prosecut attorney seeks leave to appeal; or b) your sentence exceeds the upper limit of the minimum sentence range of the applica sentencing guidelines; or c) the Court of Appeals or the Supreme Court grants your application for leave to appeal; or d) y seek leave to appeal a conditional plea under MCR 6.301(C)(2).

   If you request the appointment of an attorney and are found indigent, the court may appoint an attorney if: a) you seek lea to appeal a sentence based upon an alleged improper scoring of an offense variable or a prior record variable; and b) you objecte to the scoring or otherwise preserved the matter for appeal; and c) the sentence imposed by the court constitutes an upwa departure from the upper limit of the minimum sentence range that you allege should have been scored.

3. A request for the appointment of an attorney must be made in writing and sent directly to the court at the address noted abov within 42 days. The financial schedule on the back of this form must be completed.

RECEIPT OF NOTICE OF APPEAL RIGHTS AND APPLICATION FOR LEAVE TO APPEAL

On this day I received this form and financial schedule and an application for leave to appeal. I understand that I must return the completed Request for Appointment of Attorney to the court within 42 days if I want an attorney appointed for my appeal.

12 December 2001
Date

Antonio D Halbert
Signature of defendant/juvenile

REQUEST FOR APPOINTMENT OF ATTORNEY AND AFFIDAVIT OF INDIGENCY

I request appointment of an attorney to appeal my conviction. Conditions for my request are on the back of this form. The affidavit of indigency and financial schedule on the back of this form is submitted to show my financial condition.

☑ I request the court waive the filing fee for my application for leave to appeal.

12 December 2001
Date

Antonio D Halbert
Signature of defendant/juvenile

NOTE TO DEFENDANT/JUVENILE: After completing the request for appointment of attorney and the affidavit of indigency and financial schedule, keep one copy for yourself and return the other copy to the court.

AFFIDAVIT OF INDIGENCY AND FINANCIAL SCHEDULE

I request a court appointed attorney and submit the following information:

1. **RESIDENCE** ☐ Rent ☐ Own ☐ Live with parents ☐ Room/Board ☒ Prison _____ Number

2. **MARITAL STATUS** ☐ Single ☐ Married ☐ Divorced ☒ Separated ☐ Dependents: _____ Number

3. **INCOME** a. Employer name and address: None

   b. Length of employment: 17

   c. Average of pay ☐ weekly ☐ monthly ☐ every two w
   Gross: $ _____ Net: $ _____

   d. Other income (state monthly amount and source [DSS, VA, rent, pensions, spouse, unemployment, etc.]) If no income, state NONE.: None

4. **ASSETS** State value of car, home, bank deposits, inmate accounts, bonds, stocks, etc. If no assets, state NONE. Attach an account statement and certification for assets in prison accounts.: None

5. **OBLIGATIONS** Itemize monthly rent, installment payments, mortgage payments, child support, etc.: None

6. **REIMBURSEMENT** I understand that I may be ordered to reimburse the court for all or part of my attorney and defense co

7. I pled guilty, guilty but mentally ill, or nolo contendere and
   ☐ a. my sentence exceeds the upper limit of minimum sentence range of the applicable sentencing guidelines. Therefor I am entitled to a court appointed attorney if the court finds me indigent.
   ☐ b. I seek leave to appeal a conditional plea made under MCR 6.301(C)(2). Therefore, I am entitled to a court appointe attorney if the court finds me indigent.
   ☑ c. I believe the offense variable or a prior record variable was improperly scored and I objected to the scoring at sentenci I state that the sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelin as I believe they should have been scored. Therefore, the court may appoint a court appointed attorney if the court fin me indigent.

Antonio D Halbert
Signature

Antonio Dwayne Halbert
Name (type or print)

Jackson Pl 2
Address

[illegible] MI [illegible]
City, state, zip

Subscribed and sworn to before me o

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

THE PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff,

V.

File No. 00-019193-FH-2
01-020597-FH-2

ANTONIO D. HALBERT,

Defendant.
_____/

ORDER OF THE COURT

At a session of said Court, held in the Courthouse in the City and County of Saginaw, State of Michigan, on the 25th day of October, 2002.

PRESENT: HONORABLE ROBERT L. KACZMAREK, CIRCUIT JUDGE.

This matter comes before the Court for the Appointment of Counsel. In the instant case, an Order was issued by the Court denying the Defendant's Motion for Appellate Counsel. Having reviewed the case and current case law, the defendant does not have a constitutional or statutory right to appointment of appellate counsel to pursue a discretionary appeal. *People v. Bulger*, 462 Mich 495 (2000), *cert den* 121 S.Ct. 486.

THEREFORE, IT IS HEREBY ORDERED that defendant's Motion for Appointment of Counsel is **DENIED**.

It is so ordered.

ROBERT L. KACZMAREK
Circuit Judge
10th Judicial Circuit

Dated: October 25 2002.

A TRUE COPY
Susan Kattenbach, Clerk

Court of Appeals, State of Michigan

ORDER

PEOPLE v ANTONIO DWAYNE HALBERT

Docket No. 244756

LC No. 00-19193-FH-2; 01-020597-FH-2

HILDA R. GAGE
Presiding Judge

E. THOMAS FITZGERALD

HENRY WILLIAM SAAD
Judges

The Court orders that the defendant-appellant's delayed application for leave to appeal is DENIED for lack of merit in the grounds presented.

HILDA R. GAGE
Presiding Judge

STATE OF MICHIGAN COURT OF APPEALS

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JAN 13 2003
Date

Sandra Schultz Mengel
Chief Clerk

Order

Entered: September 19, 2003

Michigan Supreme Court
Lansing, Michigan

Maura D. Corrigan,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

123342

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

ANTONIO DWAYNE HALBERT,
Defendant-Appellant.

SC: 123342
COA: 244756
Saginaw CC: 00-19193-FH-2;
01-020597-FH-2

On order of the Court, the application for leave to appeal the January 13, 2003 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Cavanagh, J., states as follows:

I would remand to the Court of Appeals for reconsideration of the defendant's application for leave to appeal. I would further direct the Court of Appeals, before reconsidering the application, to remand the case to the Saginaw Circuit Court for appointment of counsel. Counsel then could, within a reasonable time limit set by the Court of Appeals, file a supplement which the Court of Appeals would consider as though it were a part of the defendant's initial application.

Kelly, J., joins in the statement of Cavanagh, J.

s0916

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 19, 2003 Robin R. Davis

13b

Approved, SCAO

Information - Circuit court
Original complaint - Court
Warrant - Court

Bind over/Transfer - Circuit/Juvenile court
Complaint copy - Prosecutor
Complaint copy - Defendant/Attorney

STATE OF MICHIGAN JUDICIAL DISTRICT 10th JUDICIAL CIRCUIT	Page 1 of 3 INFORMATION FELONY	CASE NO. DISTRICT CIRCUIT 00-019193 FH-2

District Court ORI: MI-

Circuit Court ORI: MI-

THE PEOPLE OF THE STATE OF MICHIGAN v

Defendant's name and address: ANTONIO DWAYNE HALBERT, 2545 BEWICK, SAGINAW, MI 48601

Victim or complainant: LORETTA PRICE

Complaining witness: LORETTA PRICE

Co-defendant(s)

Date: On or about x before 6/27/00

City/Twp./Village	County in Michigan	Defendant CTN	Defendant SID	Defendant DOB
VARIOUS LOCATIONS IN SAGINAW COUNTY		73 00 004569 01		12/30/67

Police agency report no.	Charge	Maximum penalty
856 2223-00		

Defendant DLN

Witnesses

* LORETTA PRICE	* SHAVONNE HARRIS	* JAMES BAKER
* R. WEATHERSPOON	* SHARNAE PERRY	WAVONNE HALBERT
K. MCINERNEY	* ALEXANDRIA BEVERLY	* ERICA FAIRRES
* MARIA MCKINNEY	* DWAYNE FAIRRES	* HELEN DRAKE
* FRED CAVAZOS	* EBONIE MCKINNEY	

STATE OF MICHIGAN, COUNTY OF Saginaw

IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN: The prosecuting attorney for this County appears before the court and informs the court that on the date and at the location described, the defendant:

COUNT I - SECOND DEGREE CRIMINAL SEXUAL CONDUCT - PERSON UNDER THIRTEEN

One Antonio Dwayne Halbert, late of the County of Saginaw, State of Michigan did engage in sexual contact with another person, to-wit: Maria McKinney at the Buena Vista Community Center at 1940 S. Outer Drive on June 27, 2000, said person being under 13 years of age; Contrary to Sec. 750.520c(1)(a); M.S.A. 28.788(3)(1)(a). (750.520C1A)

HIV/STD TESTING NOTICE

Take Notice that pursuant to MCL 333.5129; MSA 14.15(5129), upon bindover to circuit court or recorder's court, the district court judge shall order the defendant to be tested for venereal disease, hepatitis B infection, and for the presence of HIV or an antibody to HIV if the judge determines there is reason to believe the violation involved sexual penetration or exposure to a body fluid of the defendant. If the district judge determines that testing is not required, upon conviction the court must order the defendant to be tested.

FELONY: 15 years; mandatory AIDS/STD testing

*The People intend to produce at trial those witnesses designated by asterisk pursuant to 1986 PA 46.

and against the peace and dignity of the State of Michigan.

Date 11/2/00

Prosecuting Attorney

By: Barbara L. Meter

BARBARA L. METER

14b

MCL 764.1 et seq.; MSA 28.860 et seq., MCL 766.1 et seq.; MSA 28.919 et seq.; MCL 767.1 et seq.; MSA 28.941 et seq.; MCR 6.112(D)

MC 200 (4/99) FELONY SET Information

Approved, SCAO

Information - Circuit court
Original complaint - Court
Warrant - Court

Bind over/Transfer - Circuit/Juvenile court
Complaint copy - Prosecutor
Complaint copy - Defendant/Attorney

STATE OF MICHIGAN JUDICIAL DISTRICT 10th JUDICIAL CIRCUIT	Page 2 of 3 INFORMATION FELONY	CASE NO. DISTRICT CIRCUIT 00-019193 FH-2

District Court ORI: MI- Circuit Court ORI: MI-

THE PEOPLE OF THE STATE OF MICHIGAN v	Defendant's name and address: ANTONIO DWAYNE HALBERT 2545 BEWICK SAGINAW, MI 48601	Victim or complainant: LORETTA PRICE
		Complaining witness: LORETTA PRICE
Co-defendant(s)		Date: On or ~~about~~ before 6/27/00

City/Twp./Village	County in Michigan	Defendant CTN	Defendant SID	Defendant DOB
VARIOUS LOCATIONS IN SAGINAW COUNTY		73 00 004569 01		12/30/67

Police agency report no.	Charge	Maximum penalty
856 2223-00		

Defendant DLN:

Witnesses

* LORETTA PRICE	* SHAVONNE HARRIS	*JAMES BAKER
* R. WEATHERSPOON	* SHARNAE PERRY	WAVONNE HALBERT
K. MCINERNEY	* ALEXANDRIA BEVERLY	* ERICA FAIRRES
* MARIA MCKINNEY	* DWAYNE FAIRRES	* HELEN DRAKE
* FRED CAVAZOS	* EBONIE MCKINNEY	

STATE OF MICHIGAN, COUNTY OF Saginaw

IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN: The prosecuting attorney for this County appears before the court and informs the court that on the date and at the location described, the defendant:

COUNT II - SECOND DEGREE CRIMINAL SEXUAL CONDUCT - RELATIONSHIP

One Antonio Dwayne Halbert, late of the County of Saginaw, State of Michigan did engage in sexual contact with another person, to-wit: Shavonne Harris. at 2545 Bewick, on a date in April or May 2000, said victim being at least 13 but less than 16 years of age, to-wit: 13 years old, and the defendant being a member of the same household as the victim; Contrary to Sec. 750.520c(1)(b); M.S.A. 28.788(3)(1)(b). (750.520C1B)

HIV/STD TESTING NOTICE

Take Notice that pursuant to MCL 333.5129; MSA 14.15(5129), upon bindover to circuit court or recorder's court, the district court judge shall order the defendant to be tested for venereal disease, hepatitis B infection, and for the presence of HIV or an antibody to HIV if the judge determines there is reason to believe the violation involved sexual penetration or exposure to a body fluid of the defendant. If the district judge determines that testing is not required, upon conviction, the court must order the defendant to be tested.

FELONY: 15 years; mandatory AIDS/STD testing

*The People intend to produce at trial those witnesses designated by asterisk pursuant to 1986 PA 46.

and against the peace and dignity of the State of Michigan.

Prosecuting Attorney

By: _____

BARBARA L. METER

Date

15b

MCL 764.1 et seq.; MSA 28.860 et seq., MCL 766.1 et seq.; MSA 28.919 et seq.; MCL 767.1 et seq.; MSA 28.941 et seq., MCR 6.112(D)

MC 200 (4/99) FELONY SET Information

Approved, SCAO

Information - Circuit court
Original complaint - Court
Warrant - Court

Bind over/Transfer - Circuit/Juvenile court
Complaint copy - Prosecutor
Complaint copy - Defendant/Attorney

STATE OF MICHIGAN JUDICIAL DISTRICT 10th JUDICIAL CIRCUIT	Page 3 of 3 INFORMATION FELONY	CASE NO. DISTRICT CIRCUIT 00-019193 FH-2

District Court ORI: MI- Circuit Court ORI: MI-

THE PEOPLE OF THE STATE OF MICHIGAN v	Defendant's name and address: ANTONIO DWAYNE HALBERT 2545 BEWICK SAGINAW, MI 48601	Victim or complainant: LORETTA PRICE
		Complaining witness: LORETTA PRICE
Co-defendant(s)		Date: On or ~~about~~ before 6/27/00

City/Twp./Village	County in Michigan	Defendant CTN	Defendant SID	Defendant DOB
VARIOUS LOCATIONS IN SAGINAW COUNTY		73 00 004569 01		12/30/67

Police agency report no.	Charge	Maximum penalty
856 2223-00		

Defendant DLN:

Witnesses

* LORETTA PRICE	* SHAVONNE HARRIS	* JAMES BAKER
* R. WEATHERSPOON	* SHARNAE PERRY	WAVONNE HALBERT
K. MCINERNEY	* ALEXANDRIA BEVERLY	* ERICA FAIRRES
* MARIA MCKINNEY	* DWAYNE FAIRRES	* HELEN DRAKE
* FRED CAVAZOS	* EBONIE MCKINNEY	

STATE OF MICHIGAN, COUNTY OF Saginaw

IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN: The prosecuting attorney for this County appears before the court and informs the court that on the date and at the location described, the defendant:

COUNT III - SECOND DEGREE CRIMINAL SEXUAL CONDUCT - PERSON UNDER THIRTEEN

One Antonio Dwayne Halbert, late of the County of Saginaw, State of Michigan did engage in sexual contact with another person, to-wit: Shar'nae Perry, at 2545 Bewick, on a date in June 2000, said person being under 13 years of age; Contrary to Sec. 750.520c(1)(a); M.S.A. 28.788(3)(1)(a). (750.520C1A)

HIV/STD TESTING NOTICE

Take Notice that pursuant to MCL 333.5129; MSA 14.15(5129), upon bindover to circuit court or recorder's court, the district court judge shall order the defendant to be tested for venereal disease, hepatitis B infection, and for the presence of HIV or an antibody to HIV if the judge determines there is reason to believe the violation involved sexual penetration or exposure to a body fluid of the defendant. If the district judge determines that testing is not required, upon conviction the court must order the defendant to be tested.

FELONY: 15 years; mandatory AIDS/STD testing

*The People intend to produce at trial those witnesses designated by asterisk pursuant to 1986 PA 46.

and against the peace and dignity of the State of Michigan.

Prosecuting Attorney

By: _____

BARBARA L. METER

Date

16b

MCL 764.1 et seq.; MSA 28.860 et seq., MCL 766.1 et seq.; MSA 28.919 et seq.; MCL 767.1 et seq.; MSA 28.941 et seq., MCR 6.112(D)

MC 200 (4/99) FELONY SET Information

Approved, SCAO

Information - Circuit court
Original complaint - Court
Warrant - Court

Bind over/Transfer - Circuit/Juvenile court
Complaint copy - Prosecutor
Complaint copy - Defendant/Attorney

STATE OF MICHIGAN JUDICIAL DISTRICT 10th JUDICIAL CIRCUIT	INFORMATION FELONY	CASE NO. DISTRICT CIRCUIT 01-020597 FH-2

District Court ORI: MI- Circuit Court ORI: MI-

Defendant's name and address	Victim or complainant
THE PEOPLE OF THE STATE OF MICHIGAN v ANTONIO DWAYNE HALBERT 2545 BEWICK SAGINAW, MI 48601	RUSS UPHOLD
	Complaining witness: RUSS UPHOLD
Co-defendant(s)	Date: On or about 7/17/01

City/Twp /Village	County in Michigan	Defendant CTN	Defendant SID	Defendant DOB
2545 BEWICK, BUENA VISTA TOWNSHIP		73 01 004748 01		12/30/67

Police agency report no	Charge	Maximum penalty
856 2825-01		Defendant DLN

Witnesses

* RUSS UPHOLD
* SHAVONNE CHARLENE HARRIS
BETTY BLONIARCZYK
* ROYANA SILER
* ARETHA BLACKMON
CONNIE CHAPIN
DAZARENE BLEDSON
* CRAIG TUER
* NEIL SOMERS
* DAN REINHARDT

STATE OF MICHIGAN, COUNTY OF Saginaw
IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN: The prosecuting attorney for this County appears before the court and informs the court that on the date and at the location described, the defendant:

SECOND DEGREE CRIMINAL SEXUAL CONDUCT - RELATIONSHIP
One Antonio Dwayne Halbert, late of the County of Saginaw, State of Michigan did engage in sexual contact with another person, to-wit: Shavonne Harris, said victim being at least 13 but less than 16 years of age, to-wit: Age 14 years, and the defendant being related to the victim by blood or affinity to the fourth degree; Contrary to Sec. 750.520c(1)(b); M.S.A. 28.788(3)(1)(b). (750.520C1B)

HIV/STD TESTING NOTICE
Take Notice that pursuant to MCL 333.5129; MSA 14.15(5129), upon bindover to circuit court or recorder's court, the district court judge shall order the defendant to be tested for venereal disease, hepatitis B infection, and for the presence of HIV or an antibody to HIV if the judge determines there is reason to believe the violation involved sexual penetration or exposure to a body fluid of the defendant. If the district judge determines that testing is not required, upon conviction, the court must order the defendant to be tested.
FELONY: 15 years; mandatory AIDS/STD testing

*The People intend to produce at trial those witnesses designated by asterisk pursuant o 1986 PA 46.

and against the peace and dignity of the State of Michigan.

Prosecuting Attorney

10-8-01
Date

By: [signature]
PAUL M. FEHRMAN

17b

MCL 764.1 et seq.; MSA 28.860 et seq., MCL 766.1 et seq.; MSA 28.919 et seq.; MCL 767.1 et seq.; MSA 28.941 et seq., MCR 6.112(D)

MC 200 (4/89) **FELONY SET, Information**

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

PEOPLE OF THE STATE OF MICHIGAN

vs. File Nos. 00-019193-FH-2
01-020597-FH-2

ANTONIO DWAYNE HALBERT,

Defendant.
_____/

PLEA

BEFORE THE HONORABLE ROBERT L. KACZMAREK, CIRCUIT JUDGE

Saginaw, Michigan - November 7, 2001

APPEARANCES:

For the People: PAMELA A. MARSHALL (P54055)
ASSISTANT PROSECUTING ATTORNEY
111 S. Michigan Avenue
Saginaw, MI 48602-2019
(989) 790-5330

For Defendant: RODNEY J. O'FARRELL (P24899)
Attorney at Law
1609 Court Street
Saginaw MI 48602-4070
(989) 792-9767

Reported by: KATHRYN A. TAGGET, RMR, CSR-3584
Official Court Reporter

MS. MARSHALL: Pamela Marshall for the People.

These matters were set for trial yesterday. We have reached a plea agreement in these cases. It's my understanding the defendant will be pleading guilty to Count I, CSC second-degree under 13 on case 00-19193 and that should be involving the victim, Maria McKinney. I'm sorry, that's a no contest plea. He will also be pleading no contest to Count I on case 01-020597-FH-2, criminal sexual conduct second-degree, relationship, and that victim is Shayvon Harris.

In exchange for pleas of no contest on those two counts, the People agree to dismiss Count II and Count III on case 00-019193-FH-2. We also recommend the defendant be sentenced within the guidelines and we're requesting consecutive sentencing in this matter that is discretionary with the Court. And it's my understanding defendant will be requesting concurrent sentencing, but we are requesting consecutive.

And the no contest plea -- I believe we provided the police reports to the Court. We would both stipulate to those as the basis for the no contest plea, and the reason for the no contest plea is the possibility of civil liability.

MR. O'FARRELL: Your Honor, Rod O'Farrell on

behalf Mr. Halbert. That's a correct statement. This is what I have discussed with my client, Your Honor. He does understand it and we do wish to enter a plea of no contest to the two counts as referred to contained in these two cases.

The potential for consecutive sentencing is discretionary with the Court because the second offense occurred while on bond for the first offense, Your Honor. I would state further that the civil liability in this case is active. There is neglect proceedings involving my client and specifically the mother of Shayvon in the second case and that also was affected by the first case since Shayvon was a victim in one of the cases that is being dismissed in that case.

With that being said, Your Honor, I believe my client does understand this agreement and is prepared to enter into the plea of no contest at this time, and we do stipulate to the reports as referred to by the prosecutor.

(Defendant sworn.)

THE COURT: Your name, sir?

THE DEFENDANT: Antonio Halbert, Antonia Dwayne, Halbert.

THE COURT: Are you presently on probation or parole?

THE DEFENDANT: No.

THE COURT: Do you understand the maximum penalty for these offenses is 15 years?

THE DEFENDANT: Yes, sir.

THE COURT: You understand if I accept your no contest plea we'll not have a trial of any kind and you will give up certain rights that you have at a trial?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand you have a right to a trial by a jury?

THE DEFENDANT: Yes, sir.

THE COURT: By entering this plea you are giving up that right.

THE DEFENDANT: Yes, sir.

THE COURT: You also have a right to a trial by the Court without a jury with the consent of both the prosecutor and the trial judge. You have a right to a non-jury trial.

THE DEFENDANT: Yes, sir, I understand, I do.

THE COURT: By entering these pleas you are giving up that right.

THE DEFENDANT: Yes, sir.

THE COURT: You have a right to be presumed innocent until proven guilty at the trial, do you

understand that?

THE DEFENDANT: Yes, sir.

THE COURT: By entering this plea you are giving up that right.

THE DEFENDANT: Yes, sir.

THE COURT: You have a right to have the burden of proving your guilt beyond a reasonable doubt placed on the prosecution throughout the trial, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: By entering this plea you are giving up that right.

THE DEFENDANT: Yes, sir.

THE COURT: You have a right to have the witnesses appear against you, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: By entering this plea you are giving up that right.

THE DEFENDANT: Yes, sir.

THE COURT: You have a right to question the witnesses who appear against you, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: By entering this plea you are giving up that right.

THE DEFENDANT: Yes, sir.

THE COURT: You have a right to have the Court order any witnesses you wished produced for your defense to appear at the trial, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: By entering this plea you are giving up that right.

THE DEFENDANT: Yes, sir.

THE COURT: You have a right to remain silent during the trial; in other words, you don't have to testify. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: By entering this plea you are giving up that right.

THE DEFENDANT: Yes, sir.

THE COURT: You have a right not to have your silence used against you, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: By entering this plea you are giving up that right.

THE DEFENDANT: Yes, sir.

THE COURT: And you have a right to testify at the trial if you want to, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: By entering this plea you are

giving up that right.

THE DEFENDANT: Yes, sir.

THE COURT: You understand if I accept your plea you are giving up or waiving any claim of an appeal as of right.

THE DEFENDANT: Yes, sir.

THE COURT: You are also giving up any claim this plea was the result of any promise or consideration which was not placed on the record here in court.

THE DEFENDANT: Yes, sir.

THE COURT: And you are giving up any claim this plea is not of your own free will.

THE DEFENDANT: Yes, sir.

THE COURT: You understand if I accept your plea and you are financially unable to retain a lawyer to represent you on appeal, the Court must appoint an attorney for you if the sentence I impose exceeds the sentencing guidelines or you seek leave to appeal a conditional plea or the prosecutor seeks leave to appeal or the Court of Appeals or Supreme Court grants you leave to appeal. Under those conditions I must appoint an attorney, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Further, if you are financially

unable to retain a lawyer to represent you on appeal, the Court may appoint an attorney for you if you allege an improper scoring of the sentencing guidelines, you object to the scoring at the time of the sentencing and the sentence I impose exceeds the sentencing guidelines as you allege it should be scored. Under those conditions I may appoint an attorney for you, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Now, as I understand what's happening today, in Case Number -- the case involving Maria McKinney, you are entering a no contest plea to second-degree criminal sexual conduct.

THE DEFENDANT: Yes, sir.

THE COURT: And in the case -- also a case involving Shayvon Harris, you are entering a no contest plea to second-degree criminal sexual conduct.

THE DEFENDANT: Yes, sir.

THE COURT: In exchange for that, Counts II, III -- and in regard to -- the Maria McKinney Information would be dismissed.

Further, the People are recommending that you be sentenced within the guidelines, although they are requesting consecutive sentencing and your counsel is indicating he's going to make a request for concurrent

sentencing. Is that your understanding of the agreement?

THE DEFENDANT: Yes, sir.

THE COURT: Counsel, have I correctly stated the agreement?

MR. O'FARRELL: You have.

MS. MARSHALL: Yes, Your Honor.

THE COURT: Any other promises or considerations I should be made aware of?

MR. O'FARRELL: There are none.

MS. MARSHALL: People are aware of none.

THE COURT: Has anyone promised you anything beyond what I've stated here on the record to induce you to make this plea?

THE DEFENDANT: No, sir.

THE COURT: Has anyone threatened you in any manner to induce you to make this plea?

THE DEFENDANT: No, sir.

THE COURT: Is it your own choice to plead no contest to both these charges?

THE DEFENDANT: Yes, it is, sir.

THE COURT: The Court has reviewed the preliminary examination in the case involving Maria McKinney and -- and I read the police reports involving Shayvon Harris and I find that if the information

contained in there were believed by the trier of fact they would prove beyond a reasonable doubt the elements of the two charges here.

Furthermore, because of the potential for civil litigation, the very nature of the case, the no contest plea is appropriate.

Do counsel believe I've complied with the court rule regarding no contest pleas?

MS. MARSHALL: People, are satisfied.

MR. O'FARRELL: Yes, Your Honor.

THE COURT: I will state for the record I have not agreed on a possible plea or possible sentence with the prosecutor, the defendant or anyone acting in the interest of either. I find the plea understandingly made, voluntary and accurate. I'll accept it. I'll refer the matter to the department of corrections for a presentence investigation.

MS. MARSHALL: Thank you.

MR. O'FARRELL: Thank you, Your Honor.

(Plea concluded.)

* * *

STATE OF MICHIGAN)
) SS
COUNTY OF SAGINAW)

I, Kathryn A. Tagget, Official Court Reporter, do hereby certify that I reported in shorthand the proceedings held in the above-entitled cause before the Honorable Robert L. Kaczmarek, Circuit Judge, in Saginaw, Michigan

I further certify that the attached and foregoing pages constitute a full, true and correct transcription of my shorthand notes then and there taken.

Kathryn A. Tagget

Kathryn A. Tagget, RMR, CSR-3584
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MICHIGAN SENTENCING GUIDELINES MANUAL

2001 EDITION

Crime Lists Effective October, 2001



WEST GROUP

29b

Michigan Sentencing Guidelines Manual

2001 Edition

Crime Lists Effective October, 2001

GENERAL INFORMATION AND INSTRUCTIONS FOR USE OF THE SENTENCING GUIDELINES

There are sentencing guidelines for all offenses which are designated as felonies, and all misdemeanor offenses punishable by more than one (1) year of incarceration, except for offenses for which there is no judicial discretion in determining the sentence. As felony offenses are newly enacted or revised, it is anticipated that those offenses will be added to the sentencing guidelines.

If the sentencing judge determines to impose an enhanced sentence pursuant to the habitual offender statutes, the appropriate sentence range will be found in the habitual offender grids.

In instances where there are multiple conviction counts for a single offender, a sentencing information report (SIR) should be completed for the conviction offense that has the highest Crime Class. In instances where the sentences imposed will be served consecutively, an SIR should be completed for every crime that will be served consecutively.

The minimum sentence may not in any case exceed two-thirds of the statutory maximum sentence.

STEP I: Determine Proper Crime Group

A. All offenses have been sorted into six Crime Groups. The Crime Groups are:

Crimes Against a Person
Crimes Against Property
Crimes Involving a Controlled Substance
Crimes Against Public Order
Crimes Against Public Safety
Crimes Against Public Trust

The Crime Group of the conviction offense governs which Offense Variables are to be scored. The applicable Crime Group may be identified by consulting one of the three offense lists contained in this manual. All guideline offenses have been separately listed alphabetically by the common name of the offense and by MCL number.

If the word "Variable" appears in the column marked Crime Group, determine the offense category, offense variable level, and prior record variable level based on the underlying offense.

STEP II: Determine Prior Record Score

1. All seven Prior Record Variables should be scored for all offenses. Where no points are appropriate for a particular Prior Record Variable, a score of zero (0) should be indicated in the appropriate space. The Prior Record Variable Score will determine the offender's Prior Record Variable Level.

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2. Prior Record Variables 1 through 6 refer only to prior convictions. Concurrent and Subsequent convictions should be scored in Prior Record Variable 7 and not in Variables 1 through 6.

3. Determine the offender's score on each variable by determining the single applicable category with the highest point.

4. The determination of whether a prior felony conviction or corresponding adjudication is "high" or "low" severity is determined by reference to the Crime Class of the prior conviction or corresponding adjudication. Felonies classified M2 (second degree murder) and A through D are "high severity", felonies classified E through H are "low severity". The applicable Crime Class may be identified by consulting one of the three offense lists contained in this manual. All guideline offenses have been separately listed ~~(1)~~ alphabetically by the common name of the offense, (2) by Crime Class, and (3) by MCL number.

5. In scoring prior record variables 1 to 5, do not use any conviction or juvenile adjudication that precedes a period of 10 years or more years between the discharge date from a conviction or juvenile adjudication and the defendant's commission of the next offense resulting in a conviction or juvenile adjudication.

   Apply this by determining the time between the discharge date for the prior conviction or juvenile adjudication most recently preceding the commission date of the sentencing offense. If it is 10 or more years, do not use that prior conviction or juvenile adjudication and any earlier conviction or juvenile adjudication in scoring prior record variables. If it is less than 10 years, use that prior conviction or juvenile adjudication in scoring prior record variables and determine the time between the commission date of that prior conviction and the discharge date of the next earlier prior conviction or juvenile adjudication. If that period is 10 or more years, do not use that prior conviction or juvenile adjudication and any earlier conviction or juvenile adjudication in scoring the prior record variables. If it is less than 10 years, use that prior conviction or juvenile adjudication in scoring prior record variables. Repeat this determination for each remaining prior conviction or juvenile adjudication until a period of 10 or more years is found or no prior convictions or juvenile adjudications remain. If a discharge date is not available, add either the time the offender was sentenced to probation or the length of the minimum incarceration term to the date of conviction and use that date as the discharge date. Discharge date means the date an individual is discharged from the jurisdiction of the court or the department of corrections after being convicted of or adjudicated responsible for a crime or an act that would be a crime if committed by an adult.

STEP III. Determine Offense Variable Score

1. Once the proper crime group is determined, the appropriate Offense Variables for that offense should be scored. Where no points are appropriate for a particular Offense Variable, a score of zero (0) should be indicated in the appropriate space. Only the variables that need to be scored for the particular crime are behind the crime group divider.

2. The total Offense Variable score will determine the severity level for that offense within the appropriate grid. Once each of the Offense Variables have been scored, the total points should be placed on the score sheet and the corresponding Offense Variable Level noted.

3. Determine the offender's score on each variable by determing the single applicable category with the highest point.

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4. For all Crimes Against a Person, score Offense Variables 1, 2, 3, 4, 7, 8, 9, 10, 11,12,13,14, and 19. Score Offense Variables 5 and 6 for homicide or attempted homicide or assault with intent to commit murder. Score Offense Variable 16 for a violation or attempted violation of Home Invasion First or Second. Score Offense Variables 17 and 18 if an element of the offense or attempted offense involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive.

5. For all Crimes Against Property, score Offense Variables 1, 2, 3, 4, 9, 10, 12, 13, 14, 16, and 19.

6. For all Crimes Involving a Controlled Substance, score Offense Variables 1, 2, 3, 12, 13, 14, 15, and 19.

7. For all Crimes Against Public Order, score Offense Variables 1, 3, 4, 9, 10, 12, 13, 14, 16, and 19.

8. For all Crimes Against Public Safety, score Offense Variables 1, 3, 4, 9, 10, 12, 13, 14, 16, and 19. Score Offense Variables 18 if an element of the offense or attempted offense involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive.

9. For all Crimes Against Public Trust, score Offense Variables 1, 3, 4, 9, 10, 12, 13, 14, 16, and 19.

STEP IV. Determine Proper Crime Class and Grid

1. Substantive Offenses

All offenses in the sentencing guidelines have been classified by Crime Group and according to offense seriousness. Gradation of offense seriousness is designated by assignment of a Crime Class for each offense. All offenses in each Crime Class have the same guideline grid. There are nine grids from which the appropriate minimum sentence guideline range will be determined based on the grid cell at which the Offense Variable Level and the Prior Record Variable Levels intersect.

The nine Crime Classes are:

- **Murder II** — Punishment is life or any term of years.
- **Class A Crimes** — Crimes for which a sentence of up to life imprisonment may be appropriate.
- **Class B Crimes** — Crimes for which a sentence of up to twenty (20) years imprisonment may be appropriate.
- **Class C Crimes** — Crimes for which a sentence of up to fifteen (15) years imprisonment may be appropriate.
- **Class D Crimes** — Crimes for which a sentence of up to ten (10) years imprisonment may be appropriate.
- **Class E Crimes** — Crimes for which a sentence of up to five (5) years imprisonment may be appropriate.
- **Class F Crimes** — Crimes for which a sentence of up to four (4) years imprisonment may be appropriate.
- **Class G Crimes** — Crimes for which a sentence of up to two (2) years imprisonment may be appropriate.
- **Class H Crimes** — Crimes for which jail or other intermediate sanctions may be appropriate.

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In most instances crimes have been classified based on the statutory maximum. There are crimes however that have statutory maximums that are either above or below the description give above. (i.e., Uttering and Publishing (14 year stat max) is a class E offense; Delivery of between 5 - 45 kilograms of marihuana (7 year) is a Class D offense).

If the word "Variable" appears in the column marked Crime Class, determine the offense class, offense variable level, and prior record variable level based on the underlying offense.

Attempts to Commit Crimes

The sentence range for a conviction of an attempt to commit an offense when no express provision is made by law for the punishment will be determined in the following manner:

Attempted A, B, C or D offenses: Score all appropriate Offense and Prior Record Variables for the underlying completed offense and use the "E" grid to determine the appropriate sentence range.

Attempted E, F or G offenses: Score all appropriate Offense and Prior Record Variables for the underlying offense and use the "H" grid to determine the appropriate sentence range.

Attempted H offenses: Attempted "H" offenses are to be sentenced to intermediate sanctions as defined in MCL 769.31(4)(c).

Offenses With Variable Statutory Maximums

The sentence range for a conviction for an offense for which the statutory maximum varies and depends on the underlying substantive offense (i.e., conspiracy, allowing a prisoner to escape, inducing a minor to commit a felony) is determined by the Crime Class of the substantive offense. These offenses are identified on the Crime Lists with the Crime Class as "SPEC" and the Statutory Maximum as "Variable".

2. Habitual Offender Sentencing

The appropriate sentence ranges for habitual offender sentence enhancement have been determined by increasing the upper limit of the appropriate cell as follows:

2nd Offense Habitual Offender - Increase Upper Limit by 25%
3rd Offense Habitual Offender - Increase Upper Limit by 50%
4th or Subsequent Offense Habitual Offender - Increase Upper Limit by 100%

If the sentencing judge determines to impose an enhanced sentence, the appropriate sentence range will be found on the grids located behind the Sentencing Grid tab. Each Crime Class has two grids; one for the substantive offenses and another for use when the court determines to impose an enhanced sentence pursuant to the habitual offender statutes.

3. Controlled Substance Sentence Enhancements

If the offender is subject to discretionary sentence enhancement on the basis of a prior Controlled Substances conviction (MCL 333.7413 et seq.), the Offense and Prior Record Variable Levels and Crime Class should be determined for the substantive offense of conviction. The guideline sentence range will be determined by the Grid for the substantive offense of conviction.

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Step V: Determine Proper Sentence Range

After scoring the appropriate Offense and Prior Record Variables, the minimum sentence guideline range for the offense being scored may be determined by examining the intersection of the Offense Variable and Prior Record Variable Levels on the appropriate grid. The guideline sentence range will be contained in the grid-cell (in months or LIFE) where the variable levels intersect.

Prison Cell: A minimum sentence within the cell is an appropriate sentence in any cell in which the minimum of the cell range is more than 12 months.

Straddle Cell: A minimum prison sentence within the cell OR an intermediate sanction which may include a jail term of not more than 12 months, is an appropriate sentence in any cell in which the maximum of the range exceeds 18 months and the minimum of the range is 12 months or less.

Intermediate Sanction Cell: An intermediate sanction sentence which may include a jail term of 0 - 12 months or the cell maximum, whichever is less, is an appropriate sentence in any cell in which the upper limit of the range is 18 months or less.

Additional Statutorily Appropriate Sentences

1. Where the guideline's range will violate the statutorily mandated minimum sentence, the sentencing judge should sentence according to the statutorily mandated minimum sentence.

2. Where the guideline's range will violate the 2/3rds rule, the sentencing judge should not impose a minimum sentence that is more than 2/3rds of the statutory maximum

3. Where the recommended minimum sentence falls in an intermediate sanction cell, the sentencing judge can sentence the offender below the cell range.

4. Where the recommended minimum sentence falls in a straddle cell, the judge can sentence the offender below the cell range.

5. The judge must sentence the offender to lifetime probation if the offense being scored is MCL 333.7401(2)(a)(iv) - Unlawful Manufacture, Delivery, or Possession With the Intent to Manufacture or Deliver a Controlled Substance in an Amount Less than 50 Grams OR MCL 333.7403 (2) (a) (iv) - Unlawful Possession of a Controlled Substance in an Amount of 25 grams or more but less than 50 grams, AND the appropriate cell is an intermediate sanction cell.

6. If a statute mandates a minimum sentence for an individual and the statute authorizes the sentencing judge to impose a sentence that is less than that minimum sentence, imposing a sentence that exceeds the recommended sentence range but is less than the mandatory minimum sentence is not a departure from the guidelines. Examples include: MCL 333.7401(2)(a)(iii) - Unlawful Manufacture, Delivery, or Possession with the Intent to Manufacture or Deliver a Controlled Substance in an Amount of 50 Grams or more but less than 225 Grams, MCL 333.7403(2)(a)(iii) - Unlawful Possession of a Controlled Substance in an Amount of 50 Grams or more but less than 225 Grams, and any offense that is part of the Michigan Vehicle Code, 1949 PA 3000, MCL 257.1 to 257.923

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STEP VI: Departure Requirements (If Applicable)

MCL 769.34(3)(a) and (b) allow a judge to depart from the guideline sentence range only where there are "substantial and compelling" reasons to do so.

The judge shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range.

Furthermore, a departure shall not be based on an offense or offender characteristic already taken into account in determining the appropriate sentence range, unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

A departure from the appropriate sentence range occurs when:

Prison Cell: A minimum sentence outside the cell is a departure, unless required by a statutory mandatory minimum or the 2/3rds rule.

Straddle Cell: A prison sentence outside the cell is a departure unless required by a statutory mandatory minimum or the 2/3rds rule.

Intermediate Sanction Cell: Any prison sentence OR a jail sentence above the cell is a departure unless required by a statutory mandatory minimum.

If the judge imposes a minimum sentence that is longer or more severe than the appropriate sentence range, the court shall:

1. State on the record the reasons for departure.

2. Advise the defendant on the record and in writing that he or she may appeal the sentence as provided by law on grounds that it is longer or more severe than the appropriate sentence range.

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DEFINITIONS

Definitions

This list is not meant to be exhaustive. Each Prior Record and or Offense Variable may have definitions and instructions that are unique to that variable

Adjudication: An adjudication is a finding of responsibility in a juvenile matter. An adjudication includes an adjudication set aside under MCL 712.18e or which has been expunged.

Aircraft: The term as defined in Section 4 of the aeronautics code of the State of Michigan, 1945 PA 327, MCL 259.4.

Cell: The intersection of the offense level and prior record level in a grid.

Prison Cell: Any cell in which the minimum of the cell range is more than 12 months.

Intermediate Sanction Cell: Any cell in which the upper limit of the range is 18 months or less.

Straddle Cell: Any cell in which the maximum of the range exceeds 18 months and the minimum of the range is 12 months or less.

Conviction: A "conviction" is an adjudication of guilt in a criminal matter. A conviction includes assignment to MCL 762.11 (HYTA) and convictions set aside under MCL 780.621 - 780.624 (expunged).

Prior Conviction: A conviction that occurred prior to the commission of the offense being scored.

Concurrent Conviction: A conviction that arises out of the same set of activities as the offense being scored.

Subsequent Conviction: A conviction that occurred after the commission of the scored offense and is unrelated to the activities that lead to the instant offense.

Crime Group: Every felony offense in Michigan is categorized in the guidelines as belonging to one of six particular crime groups. The crime groups are: **Crimes Against a Person, Crimes Against Property, Crimes Involving a Controlled Substance, Crimes Against Public Order, Crimes Against Public Safety, and Crimes Against Public Trust.**

Crime Class: Every felony offense in Michigan is categorized in the guidelines as belonging to one of nine crime classes. The classes are designated dependant on crime type and seriousness. The crime classes are: **Murder II, Class A, Class B, Class C, Class D, Class E, Class F, Class G, and Class H.**

Departure: A departure is defined by statute as a sentence imposed that is not within the appropriate minimum sentence range established under the sentencing guidelines. The appropriate minimum sentence range will sometimes be outside the indicated cell range.

There are four statutorily correct or appropriate sentences outside of specific cell length that are not departures. They are: 1) when a mandatory minimum sentence is required, 2) when the cell exceeds the 2/3rds limitation, 3) when a jail sentence is below a cell range in an intermediate sanction cell, and 4) when a jail sentence is below a cell range in a straddle cell.

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Felony: A "felony" means a violation of a penal law of this state for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year, or an offense expressly designated by law to be a felony.

Convictions from states other than Michigan or the federal government are to be considered felony convictions if the offense was punishable by more than one year of incarceration or, when the statutory penalty is not available, if the crime was designated as a felony in the convicting jurisdiction at the time of the prior conviction.

Grid: Each grid provides a recommended minimum sentence range for combinations of the offense and prior record levels for each crime classification. There are separate grids for habitual offender sentence enhancement that may be used by the sentencing judge.

Guideline Sentence Range: The set of numbers (in months or LIFE) in each cell from which the judge is required to impose a minimum sentence, absent a departure or other statutorily required sentence.

Homicide: any crime in which the death of a human being is an element of that crime (MCL 777.1(c)).

Intermediate Sanction: Any sanction, other than imprisonment in a state prison or state reformatory, that may lawfully be imposed. Intermediate sanction includes, but is not limited to, 1 or more of the following:

1) Inpatient or outpatient drug treatment
2) Probation with any probation conditions required or authorized by law
3) Residential probation
4) Probation with jail
5) Probation with special alternative incarceration
6) Mental health treatment
7) Mental health or substance abuse counseling
8) Jail
9) Jail with work or school release
10) Jail, with or without authorization for day parole
11) Participation in a community corrections program
12) Community service
13) Payment of a fine
14) House arrest
15) Electronic monitoring

Juvenile: A person over whom the Juvenile Division of the Probate Court or the Family Division of the Circuit Court has or had jurisdiction at the time of adjudication.

Misdemeanor: A "misdemeanor" means a violation of a penal law of this state which is not a felony, or a violation of an order, rule, or regulation of a state agency that is punishable by imprisonment or by a fine that is not a civil fine.

Convictions from states other than Michigan or the federal government are to be considered misdemeanor convictions if the offense was punishable by one year or less of incarceration or, when the statutory penalty is not available, if the crime was designated as a misdemeanor in the convicting jurisdiction at the time of the prior conviction.

Off the Road Vehicle (ORV): Term as defined in Section 81101 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.81101.

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Offense Variable (OV): The factors that are used to evaluate the seriousness of the offense and to determine the offender's Offense Variable score.

Offense Variable Score: The sum total of the points scored in each of the Offense Variables applicable to the offense of conviction.

Offense Variable Level (OV Level): Each grid has OV Levels along its vertical axis which are denoted by Roman numeral. The level of seriousness, and hence the guideline range, for the offense being scored increases from I to III through VI.

Prior Felony Conviction: A conviction for a felony under a law of this state, a political subdivision of this state, another state, a political subdivision of another state, or the United States if the conviction was entered before the sentencing offense was committed.

Prior Felony Juvenile Adjudication: A juvenile adjudication for conduct that if committed by an adult would be a felony under a law of this state, a political subdivision of this state, another state, a political subdivision another state, or the United States if the conviction was entered before the sentencing offense was committed.

Prior Misdemeanor Conviction: A conviction for a misdemeanor under a law of this state, a political subdivision of this state, another state, a political subdivision of another state, or the United States if the conviction was entered before the sentencing offense was committed.

Prior Misdemeanor Juvenile Adjudication: A juvenile adjudication for conduct that if committed by an adult would be a misdemeanor under a law of this state, a political subdivision of this state, another state, a political subdivision another state, or the United States if the conviction was entered before the sentencing offense was committed.

Prior Record Variable (PRV): The factors that are used to evaluate the offender's criminal history and to determine the offender's Prior Record Level.

Prior Record Score: The sum total of the points scored in each of the Prior Record Variables for the offense being scored. The Prior Record Score determines the offender's Prior Record Level.

Prior Record Level: Each grid has six (6) PRV Levels along its horizontal axis denoted by the letters "A" through "F". The guideline range for the offense being scored increases from PRV Levels "A" to "F".

Snowmobile: The term as defined in Section 82101 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.82101.

Truth In Sentencing (TIS): A designation of those felony offenses which are subject to disciplinary time if committed on or after 12-15-98. Persons convicted of TIS offenses committed on or after 12-15-98 do not earn disciplinary credits and must serve at least the complete minimum sentence imposed by the court in a secure facility before becoming eligible for parole, with the exception of a few offenses for which there is SAI eligibility. Prisoners subject to TIS will be assessed "disciplinary time" for institutional misconduct which is not added directly to the minimum sentence, but is submitted to the parole board for its consideration in granting or denying parole.

TIS is extended to all felony offenses committed on or after 12-15-2000.

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Vehicle. The term as defined in section 79 of the Michigan Vehicle Code, 1949 PA 300, MCL 257.49

Vessel. The term as defined in Section 80104 if the Natural Resource and Environmental Protection Act, 1994 PA 451, MCL 324.80104

Effective date 10-1-2000

CRIMES AGAINST A PERSON

PRV #	Points	Variable Name and Category	Instructions
1		**PRIOR HIGH SEVERITY FELONY CONVICTIONS**	1. "Prior high severity felony conviction" means a conviction for a crime listed in offense class M2, A, B, C, or D or for a felony under a law of the United States or another state corresponding to a crime listed in offense class M2, A, B, C, or D, if the conviction was entered before the sentencing offense was committed.
	75	The offender has 3 or more prior high severity convictions	
	50	The offender has 2 prior high severity convictions	
	25	The offender has 1 prior high severity conviction	
	0	The offender has no prior high severity convictions	
2		**PRIOR LOW SEVERITY FELONY CONVICTIONS**	1. "Prior low severity felony conviction" means a conviction for a crime listed in offense class E, F, G, or H, or for a felony under a law of the United States or another state corresponding to a crime listed in offense class E, F, G, or H, if the conviction was entered before the sentencing offense was committed.
	30	The offender has 4 or more prior low severity convictions	
	20	The offender has 3 prior low severity convictions	
	10	The offender has 2 prior low severity convictions	
	5	The offender has 1 prior low severity conviction	
	0	The offender has no prior low severity convictions	
3		**PRIOR HIGH SEVERITY JUVENILE ADJUDICATIONS**	1. "Prior high severity juvenile adjudication" means a juvenile adjudication for conduct that would be a crime listed in offense class M2, A, B, C, or D if committed by an adult or for conduct that would be a felony under a law of the United States or another state corresponding to a crime listed in offense class M2, A, B, C, or D if committed by an adult, if the order of disposition was entered before the sentencing offense was committed.
	50	The offender has 3 or more prior high severity juvenile adjudications	
	25	The offender has 2 prior high severity juvenile adjudications	
	10	The offender has 1 prior high severity juvenile adjudication	
	0	The offender has no prior high severity juvenile adjudications	

PRV #	Points	Variable Name and Category	Instructions
4		**PRIOR LOW SEVERITY JUVENILE ADJUDICATIONS**	1. "Prior low severity juvenile adjudication" means a juvenile adjudication for conduct that would be a crime listed in offense class E, F, G, or H, if committed by an adult or for conduct that would be a felony under a law of the United States or another state corresponding to a crime listed in offense class E, F, G, or H if committed by an adult, if the order of disposition was entered before the sentencing offense was committed.
	20	The offender has 6 or more prior low severity juvenile adjudications	
	15	The offender has 5 prior low severity juvenile adjudications	
	10	The offender has 3 or 4 prior low severity Juvenile adjudications	
	5	The offender has 2 prior low severity juvenile adjudications	
	2	The offender has 1 prior low severity juvenile adjudication	
	0	The offender has no prior low severity juvenile adjudications	
5		**PRIOR MISDEMEANOR CONVICTIONS OR PRIOR MISDEMEANOR JUVENILE ADJUDICATIONS**	1. Count a prior misdemeanor conviction or prior juvenile adjudication only if it is an offense against a person or property, a controlled substance offense, or a weapon offense. 2. Count all prior misdemeanor and prior misdemeanor adjudications for operating or attempting to operate a vehicle, vessel, ORV, snowmobile, aircraft or locomotive while under the influence of, or impaired by alcohol, a controlled substance, or a combination of alcohol and a controlled substance. 3. Do not count a prior conviction used to enhance the sentencing offense to a felony. 4. Prior misdemeanor conviction" means a conviction for a misdemeanor under a law of this state, a political subdivision of this state, another state, a political subdivision of another state, or the United States if the conviction was entered before the sentencing offense was committed. 5. "Prior misdemeanor juvenile adjudication" means a juvenile adjudication for conduct that if committed by an adult would be a misdemeanor under a law of this state, a political subdivision of this state, another state, a political subdivision of another state, or the United States if the order of disposition was entered before the sentencing offense was committed.
	20	The offender has 7 or more prior misdemeanor convictions or prior misdemeanor juvenile adjudications	
	15	The offender has 5 or 6 prior misdemeanor convictions or prior misdemeanor juvenile adjudications	
	10	The offender has 3 or 4 prior misdemeanor convictions or prior misdemeanor juvenile adjudications	
	5	The offender has 2 prior misdemeanor convictions or prior juvenile adjudications	
	2	The offender has 1 prior misdemeanor conviction or prior juvenile adjudication	
	0	The offender has no prior misdemeanor convictions or prior juvenile adjudications	

PRV #	Points	Variable Name and Category	Instructions
6		**RELATIONSHIP TO THE CRIMINAL JUSTICE SYSTEM**	1. Score the appropriate point value if the offender is involved with the criminal justice system in another state or United States. 2. "Prisoner of the department of corrections or serving a sentence in jail" includes an individual who is an escapee. 3. "Delayed sentence status" includes, but is not limited to, those sentenced under: • MCL 333.7411 (Controlled Substance) • MCL 750.350a (Parental Kidnapping) • MCL 762.11- 15 (Youthful Trainee Act) • MCL 769.4a (Assault)
	20	The offender is a prisoner of the department of corrections or serving a sentence in jail	
	15	The offender is incarcerated in jail awaiting adjudication or sentencing on a conviction or probation violation	
	10	The offender is on parole, probation or delayed sentence status or on bond awaiting adjudication or sentencing for a felony	
	5	The offender is on probation or delayed sentence status, or on bond awaiting adjudication or sentence for a misdemeanor	
	0	The offender has no relationship to the criminal justice system	
7		**SUBSEQUENT OR CONCURRENT FELONY CONVICTIONS**	1. Score the appropriate point value if the offender was convicted of multiple felony counts or was convicted of a felony after the sentencing offense was committed. 2. Do not score a felony firearm conviction in this variable. 3. Do not score a concurrent felony conviction if a mandatory consecutive sentence will result from that conviction.
	20	The offender has 2 or more subsequent or concurrent convictions	
	10	The offender has 1 subsequent or concurrent convictions	
	0	The offender has no subsequent or concurrent convictions	

OFFENSE VARIABLES FOR CRIMES AGAINST A PERSON

OV#	Pts	Variable Name and Category	Instructions
1		**Aggravated Use of A Weapon**	1. Count each person who was placed in danger of injury or loss of life as a victim. 2. In multiple offender cases, if 1 offender is assessed points for the presence, or use of a weapon, all offenders shall be assessed the same number of points. 3. Score "5" points if an offender used an object to suggest the presence of a weapon. 4. Do not score 5 points if the conviction offense is Felonious Assault or Robbery Armed.
	25	A firearm was discharged at or toward a human being or a victim was cut or stabbed with a knife or other cutting or stabbing weapon	
	15	A firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon	
	10	The victim was touched by any other type of weapon	
	5	A weapon was displayed or implied	
	0	No aggravated use of a weapon occurred	
2		**Lethal Potential of the Weapon Possessed**	1. In multiple offender cases, if 1 offender is assessed points for possessing a weapon, all offenders shall be assessed the same number of points. 2. "Fully automatic weapon" means a firearm employing gas pressure or force of recoil or other means to eject an empty cartridge from the firearm after a shot, and to load and fire the next cartridge from the magazine, without renewed pressure on the trigger for each successive shot. 3. "Pistol", "rifle", or "shotgun" includes a revolver, semi-automatic pistol, rifle, shotgun, combination rifle and shotgun, or other firearm manufactured in or after 1898 that fires fixed ammunition, but does not include a fully automatic weapon or short-barreled shotgun or short-barreled rifle. 4. "Incendiary device" includes gasoline or any other flammable substance, a blowtorch, fire bomb, Molotov cocktail or other similar device.
	15	The offender possessed an incendiary device or explosive device, or a fully automatic weapon	
	10	The offender possessed a short-barreled rifle or a short- barreled shotgun	
	5	The offender possessed a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon	
	1	The offender possessed any other potentially lethal weapon	
	0	The offender possessed no weapon	

OV#	Pts	Variable Name and Category	Instructions
3		**Physical Injury to a Victim**	1. In multiple offender cases, if 1 offender is assessed points for death or physical injury, all offenders shall be assessed the same number of points.
	100	A victim was killed	2. Score 100 points if death results from the commission of a crime and homicide is not the sentencing offense. Homicide is defined as any crime in which the death of a human being is an element of that crime.
	35	A victim was killed	3. Score 35 points if death results from the commission of a crime and the elements of the offense or attempted offense involve the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive under the influence or while impaired causing death.
	25	Life threatening or permanent incapacitating injury occurred to a victim	4. Do not score 5 points if bodily injury is an element of the sentencing offense.
	10	Bodily injury requiring medical treatment occurred to a victim	5. " Requiring medical treatment" refers to the necessity for treatment and not the victim's success in obtaining treatment.
	5	Bodily injury not requiring medical treatment occurred to a victim	
	0	No physical injury occurred to a victim	
4		**Psychological Injury to a Victim**	1. Score 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive.
	10	Serious psychological injury to victim requiring professional treatment occurred to a victim	
	0	No serious psychological injury requiring professional treatment occurred to a victim	
5		**Psychological Injury to a Member of a Victim's Family**	1. This variable is only scored when the conviction offense is Homicide, Attempted Homicide or Assault with Intent to Commit Murder. Homicide is defined as any crime in which the death of a human being is an element of that crime.
	15	Serious psychological injury requiring professional treatment occurred to a victim's family	2. Score 15 points if the serious psychological injury to the victim's family may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive.
	0	No serious psychological injury requiring professional treatment occurred to a victim's family	

Effective date 10-1-2000

OV#	Pts	Variable Name and Category	Instructions
6		**Intent to Kill or Injure Another Individual**	1. This variable is only scored when the conviction offense is Homicide, Attempted Homicide or Assault with Intent to Commit Murder. Homicide is defined as any crime in which the death of a human being is an element of that crime.
	50	The offender had premeditated intent to kill or the killing was committed while committing or attempting to commit arson, criminal sexual conduct in the first or third degree, child abuse in the first degree, a major controlled substance offense, robbery, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, or kidnapping or the killing was the murder of a peace officer or a corrections officer	2. The sentencing judge shall score this variable consistent with a jury verdict unless the judge has information that was not presented to the jury.
	25	The offender had unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result	3. Score 10 points if a killing is intentional within the definition of second degree murder or voluntary manslaughter, but the death occurred in a combative situation or in response to victimization of the offender by the decedent.
	10	The offender had intent to injure or the killing was committed in an extreme emotional state caused by an adequate provocation and before a reasonable amount of time elapsed for the offender to calm or there was gross negligence amounting to an unreasonable disregard for life	
	0	The offender had no intent to kill or injure	
7		**Aggravated Physical Abuse**	1. "Terrorism" means conduct designed to substantially increase the fear and anxiety a victim suffers during the offense.
	50	A victim was treated with terrorism, sadism, torture, or excessive brutality	2. "Sadism" means conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification.
	0	No victim was treated with terrorism, sadism, torture or excessive brutality	
8		**Victim Asportation or Captivity**	1. Count each person who was placed in danger of injury or loss of life as a victim.
	15	The victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense	2. Score 0 points if the sentencing offense is kidnapping.
	0	No victim was asported or held captive	

Effective date 10-1-2000

OV#	Pts	Variable Name and Category	Instructions
9		**Number of Victims**	1. Score 100 points only in homicide cases. Homicide is defined as any crime in which the death of a human being is an element of that crime.
	100	Multiple deaths occurred	
	25	There were 10 or more victims	2. Count each person who was placed in danger of injury or loss of life as a victim.
	10	There were 2 - 9 victims	
	0	There were fewer than 2 victims	
10		**Exploitation of a Vulnerable Victim**	1. The mere existence of one or more of these factors does not automatically equate with victim vulnerability.
	15	Predatory Conduct was involved	2. "Predatory conduct" means pre-offense conduct directed at a victim for the primary purpose of victimization.
	10	The offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship or the offender abused his or her authority status.	3. "Exploit" means to manipulate a victim for selfish or unethical purposes.
	5	The offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep or unconscious.	4. "Vulnerability" means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.
	0	The offender did not exploit a victim's vulnerability.	5. "Abuse of authority status" means a victim was exploited out of fear or deference to an authority figure, including, but not limited to, a parent, physician, or teacher.
11		**Criminal Sexual Penetration**	1. Score all sexual penetrations of the victim by the offender arising out of the sentencing offense.
	50	Two or more criminal sexual penetrations occurred	2. Multiple sexual penetrations of the victim by the offender extending beyond the sentencing offense may be scored in offense variables 12 or 13.
	25	One criminal sexual penetration occurred	3. Do not score points for the 1 penetration that forms the basis of a first or third degree criminal sexual conduct offense.
	0	No criminal sexual penetrations occurred	

Effective date 10-1-2000

OV#	Pts	Variable Name and Category	Instructions
12		**Contemporaneous Felonious Criminal Acts**	1. A felonious criminal act is contemporaneous if both of the following circumstances exist: (1) the act occurred within 24 hours of the sentencing offense, and, (2) the act has not and will not result in a separate conviction.
	25	Three or more contemporaneous felonious criminal acts involving crimes against a person were committed	2. A felony firearm conviction should not be considered when scoring this variable.
	10	Two contemporaneous felonious criminal acts involving crimes against a person were committed	3. Do not score conduct scored in offense variable 11.
	10	Three or more contemporaneous felonious criminal acts involving other crimes were committed	
	5	One contemporaneous felonious criminal act involving a crime against a person was committed	
	5	Two contemporaneous felonious criminal acts involving other crimes were committed	
	1	One contemporaneous felonious criminal act involving any other crimes was committed	
	0	No contemporaneous felonious criminal acts were committed	
13		**Continuing Pattern of Criminal Behavior**	1. For determining the appropriate points under this variable, all crimes within a five-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.
	50	The offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age.	2. The presence or absence of multiple offenders, the age of the offenders, or the degree of sophistication of the organized criminal group is not as important as the fact of the group's existence, which may be reasonably inferred from the facts surrounding the sentencing offense.
	25	The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.	3. Except for offenses related to membership in an organized criminal group, do not score conduct scored in offense variable 11 or 12.
	10	The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property.	4. Score 50 points only if the sentencing offense is first degree criminal sexual conduct.
	10	The offense was part of a pattern of felonious criminal activity directly related to membership in an organized criminal group.	
	5	The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against property.	
	0	No pattern of felonious criminal activity existed.	

Effective date 10-1-2000

OV#	Pts	Variable Name and Category	Instructions
14		**Offenders Role**	1. The entire criminal transaction should be considered when scoring this variable.
	10	The offender was a leader in a multiple offender situation	2. If 3 or more offenders were involved, more than 1 offender may be determined to have been a leader.
	0	The offender was not a leader in a multiple offender situation	
16		**Property Obtained, Damaged, Lost or Destroyed**	1. This variable is scored in the Crimes Against a Person crime group only if the offense being scored is Home Invasion First or Second.
	10	Wanton or malicious damage occurred beyond that necessary to commit the crime for which the offender is not charged and will not be charged	2. In multiple offender or victim cases, the appropriate points may be determined by adding together the aggregate value of money or property involved, including property involved in uncharged offenses or charges dismissed under a plea agreement.
	10	The property had a value of more than $20,000.00 or had significant historical, social, or sentimental value	3. In cases in which the property was obtained unlawfully, lost to the lawful owner, or destroyed, use the value of the property in scoring this variable. If the property was damaged, use the monetary amount appropriate to restore the property to pre-offense condition in scoring this variable.
	5	The property had a value of $1,000.00 or more but not more than $20,000.00	4. The amount of money or property involved in admitted but uncharged offenses or in charges that have been dismissed under a plea agreement may be considered.
	1	The property had a value of $200.00 or more but not more than $1000.00	
	0	No property was obtained, damaged, lost or destroyed or the property had a value of less $200.00	
17		**Degree of Negligence Exhibited**	1. Score OV 17 if an element of the offense or attempted offense involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive.
	10	The offender showed a wanton or reckless disregard for the life or property of another person	2. Do not score 10 points if points are given in offense variable 6.
	5	The offender failed to show the degree of care that a person of ordinary prudence in a similar situation would have shown	
	0	The offender was not negligent	

OV#	Pts	Variable Name and Category	Instructions
18		**Operator Ability Affected by Alcohol or Drugs**	1. Score OV 18 if an element of the offense or attempted offense involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive.
	20	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive when his or her bodily alcohol content was 0.20 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine	2. "Any bodily alcohol content" means either of the following: 1) an alcohol content of not less than 0.02 grams or more than 0.07 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or 2) any presence of alcohol within a individual's body resulting from the consumption of intoxicating liquor other than consumption of intoxicating liquor as part of a generally recognized religious service or ceremony.
	15	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive when his or her bodily alcohol content was 0.15 grams or more but less than 0.20 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine	
	10	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive when his or her bodily alcohol content was 0.10 grams or more but less than 0.15 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or while he or she was under the influence of intoxicating liquor or a controlled substance or a combination of intoxicating liquor and a controlled substance	
	5	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive when his or her bodily alcohol content was 0.07 grams or more but less than 0.10 grams of alcohol per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or while he or she was visibly impaired by the use of intoxication liquor or a controlled substance, or a combination of intoxication liquor and a controlled substance, or was less than 21 years of age and had any bodily alcohol content	
	0	The offender's ability to operate a vehicle was not affected by an intoxicating liquor or a controlled substance or a combination of intoxicating liquor and a controlled substance.	

OV#	Pts	Variable Name and Category	Instructions
19		**Threat to the Security of a Penal Institution or Court or Interference with the Administration of Justice**	
	25	The offender by his or her conduct threatened the security of a penal institution or court	
	15	The offender used force or the threat of force against another person or the property of another person to interfere with or attempt to interfere with the administration of justice	
	10	The offender otherwise interfered with or attempted to interfere with the administration of justice	
	0	The offender did not threaten the security of a penal institution or court or interfere with or attempt to interfere with the administration of justice	

GRIDS

CLASS C OFFENSES

Note: Minimum sentence not to exceed 2/3rds of the statutory maximum

PRV LEVEL

OV LEVEL	A 0 Points	B 1 - 9 Points	C 10 - 24 Points	D 25 - 49 Points	E 50 - 74 Points	F 75+ Points
I 0-9 Points	0 - 11*	0 - 17*	10 - 19	12 - 24	19 - 38	29 - 57
II 10-24 Points	0 - 17*	5 - 17*	12 - 24	19 - 38	29 - 57	36 - 71
III 25-34 Points	10 - 19	12 - 24	19 - 38	29 - 57	36 - 71	43 - 86
IV 35-49 Points	12 - 24	19 - 38	29 - 57	36 - 71	43 - 86	50 - 100
V 50-74 Points	19 - 38	29 - 57	36 - 71	43 - 86	50 - 100	58 - 114
VI 75+ Points	29 - 57	36 - 71	43 - 86	50 - 100	58 - 114	62 - 114

October, 1999 — Asterisked cells are Intermediate Sanction cells, Shaded cells are Straddle cells, Unmarked cells are Prison cells

BEST AVAILABLE COPY

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

PEOPLE OF THE STATE OF MICHIGAN

vs. File Nos. 00-019193-FH
01-020597-FH

ANTONIO D. HALBERT,

Defendant.
_____/

SENTENCE

BEFORE THE HONORABLE ROBERT L. KACZMAREK, CIRCUIT JUDGE

Saginaw, Michigan - December 10, 2001

APPEARANCES:

For the People: BERNARD J. COPPOLINO (P33577)
ASSISTANT PROSECUTING ATTORNEY
111 S. Michigan Avenue
Saginaw, MI 48602-2019
(989) 790-5330

For Defendant: RODNEY J. O'FARRELL (P24899)
Attorney at Law
1609 Court Street
Saginaw MI 48602-4070
(989) 792-9767

Reported by: Tracy M. Stemler, CSR-4023
Official Court Reporter

December 10, 2001

Saginaw, Michigan

THE COURT: Okay. Sir, you were in court back on November 7th of this year at which time you pled guilty to two counts of second degree criminal sexual conduct. Is that correct?

THE DEFENDANT: It was no contest, yes, sir.

THE COURT: Have you had a chance to talk to the Department of Corrections about what happened here?

THE DEFENDANT: Have I had a chance to talk with them?

THE COURT: Did you talk to Miss Hall?

THE DEFENDANT: Yes, sir.

THE COURT: Did you review her report?

THE DEFENDANT: Yes, sir.

THE COURT: Is there anything inaccurate in the report?

THE DEFENDANT: No, sir.

THE COURT: Counsel have a chance to review the report?

MR. O'FARRELL: Yes, your Honor. Rod O'Farrell on behalf of Mr. Halbert. I read through it with him the end of last week. It is accurate. We have no additions or corrections.

THE COURT: Anything in addition to the

report?

MR. O'FARRELL: No, your Honor, not at this time.

THE COURT: Mr. Coppolino, anything?

MR. COPPOLINO: Your Honor, it's my understanding that a representative of the victim does wish to address the Court.

THE COURT: Okay.

MR. O'FARRELL: Judge, excuse me. When you said in addition to the report, did you mean -- you weren't talking about allocution, were you?

THE COURT: Yeah, I was.

MR. O'FARRELL: Oh, I'm sorry. Then I would have some remarks, your Honor.

Your Honor, as the Court is aware, there's an issue in this case of consecutive versus concurrent sentencing. The Court has discretion because this second offense occurred while on bond on the first offense.

Mr. Halbert and his wife had retained me in this case. Mr. Halbert had been on tether throughout the great majority of the time period between the first and the second offense. He had been undertaking counseling with Mr. Gonzales from the Department of Mental Health, and we have received positive reports

through that period.

Mr. Halbert recognizes that he has a problem. He has some remarks that he will address to the Court when given the opportunity, but I would ask the Court to sentence him concurrently, your Honor, and I believe that in all the circumstances in this case, that a sentence in the midpoint of the guideline range would be appropriate.

MR. COPPOLINO: Mr. McKinney.

THE VICTIM: Your Honor, my name is Alondo McKinney, parents of Maria McKinney, the victim, and I think he should get -- me, myself, I feel he should get consecutive because you all let him out once and let him go back and do it again. Me, myself, I don't care -- that's my child. It could be any child. You don't let nobody out there touching no 12, 13-year-old kid.

THE COURT: Thank you.

MR. COPPOLINO: Your Honor, for the People, we would also be recommending consecutive sentencing given the nature of these offenses.

THE COURT: Sir, anything you want to add?

THE DEFENDANT: Yes, sir. To your Honor and the people of the court, I, Antonio Halbert, would like to say to the people of the court I have been a moral

person all my life. I've made a mistake. I have to live with it for the rest of my life. To the families that I have done things to that was unmoral, I am sorry for what I have done. I want to be -- I want it to be made known I work and got through school. I would like to still work in society to be the best person I could possibly be. When I get out, I would like to get help, and while incarcerated, I would seek counseling.

I would like the Court to know I am very sorry for what happened, and I'm sorry for this case -- for this case had to be presented before you, your Honor. I am a church-going person. I believe in what's right for all people in the world.

I would like another chance to do right for myself and family. I feel I could show the Court what kind of person I really am, and I have the Lord to thank because, with his help, I can become a better person. I will accept the responsibility for what has happened and accept the punishment by saying to the Court and the families I am sorry.

THE COURT: Okay. In regard to Case Number 0019193, the maximum penalty I'm setting at 15 years, the minimum at 24 months. Consecutive with that on Case Number 0120597, the maximum 15, the minimum at 57 months. These are within the guidelines. Credit for

how many -- 138 days?

MR. O'FARRELL: I believe the one case has --

THE COURT: 164?

MR. O'FARRELL: Yes.

THE COURT: 164 days credit.

MR. COPPOLINO: And that's -- with it being consecutive, then, your Honor, the 164 applies to the first case. Correct?

THE COURT: Correct.

MR. O'FARRELL: Thank you, Judge.

THE COURT: If you wish to appeal either your plea or sentence, I'll give you a form which explains the conditions under which I must appoint an attorney and the conditions under which I may appoint an attorney. The request for the appointment of attorney must be made in writing and sent to the court within 42 days. There's a 60-dollar Victim Rights Fund on each one of them.

THE CLERK: No forensic lab?

THE COURT: I don't believe so.

(Proceedings adjourned.)

STATE OF MICHIGAN)
) SS
COUNTY OF SAGINAW)

I certify that this transcript is a complete, true and correct transcript of the proceedings and testimony taken in this case before the Honorable Robert L. Kaczmarek, Circuit Judge, in Saginaw, Michigan.

Tracy M. Stemler, CSR-4023
Official Court Reporter
111 South Michigan Avenue
Saginaw, MI 48602

3391-01

STATE OF MICHIGAN
IN THE CIRCUIT COURT OF THE COUNTY OF SAGINAW

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v. File No. 01-020597-FH-2
File No. 01-019193-FH-2

ANTONIO HALBERT,

Defendant.
_____/

ORDER OF THE COURT

At a session of said Court, held at the Court House in the City of Saginaw, County of Saginaw, and State of Michigan, this 18th day of December 2001;

PRESENT: HONORABLE ROBERT L. KACZMAREK, Circuit Judge

This matter comes before the Court on Defendant's Motion to Withdraw Plea.

The Defendant was sentenced on December 10, 2001. The Defendant's Motion to Withdraw Plea is not timely as it was made after sentencing on December 11, 2001. After reviewing the record, there was no agreement as to if the sentences were to run concurrent or consecutive. The Defendant's proper remedy is to appeal to the Michigan Court of Appeals. Accordingly, Defendant's motion is **DENIED**.

It is so ordered.

ROBERT L. KACZMAREK
Circuit Judge
10th Judicial Circuit

Dated: December 18, 2001

Honorable Robert L. Kaczmarek
Saginaw County Circuit Court Judge
111 S. Michigan Ave.
Saginaw, MI 48602

September 6, 2002

RE: People v Antonio D. Halbert
Case No's: 00-19193-FH & 01-20597-FH-2

Dear Judge Kaczmarek:

I am the above named defendant. I previously attempted to have a lawyer appointed for post-conviction and the request was denied.

Please find herein enclosed a Defendant's Motion for Appointment of Counsel with an included Motion for Evidentiary Hearing/Resentencing.

I present to the court that I may be entitled to appointment of counsel to assist me due to my meeting the criteria of seeking an appeal for misscored guidelines and the sentence imposed by the court would be in excess of properly scored guidelines.

Although I have not had this issue preserved at sentencing, I am seeking to have the issue addressed by the court prior to seeking relief in the Court of Appeals if relief is denied in the trial court.

Please review the enclosed motion and advise me of the Court's decision on my requests as soon as possible so that I may have at least some time of the 12 month period for filing an Application for Leave to Appeal directly to the Michigan Court of Appeals.

In considering my request, please take into account the findings of the US District Court wherein it was stated that the Public Act Codifying the practice of denying appointed counsel to indigents seeking leave to appeal their plea based felony convictions is unconstitutional and Declaratory relief was ordered, **Tesmer** v **Granholm**, 114 F.Supp2d 603 (2000).

It would be greatly appreciated if Your Honor would at this time appoint counsel to assist me in my efforts to have my sentencing guidelines corrected and resentenced or to seek leave to appeal.

Respectfully submitted,

Antonio D Halbert #382400
Antonio D. Halbert, #382400
Defendant in pro per
Muskegon Correctional Facility
2400 S. Sheridan Rd.
Muskegon, MI 49442-6298

cc: Michael D. Thomas
file

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v. File No. 00-019193-FH-2
01-020597-FH-2

ANTONIO HALBERT,

Defendant. /

DEFENDANT'S MOTION FOR APPOINTMENT OF COUNSEL AND REMAND FOR EVIDENTIARY HEARING/RESENTENCING

NOW COMES Defendant, ANTONIO HALBERT, in pro per, and pursuant to MCR 6.429(C) petitions this Court to APPOINT COUNSEL to assist Defendant preserve issues concerning the Presentence Report and Scoring of the Sentencing Guidelines by filing a Motion for an Evidentiary Hearing on Ineffective Assistance of Counsel and/or Motion for Resentencing, and in support hereof states as follows:

1. On November 7, 2001, Defendant pled NO CONTEST on two counts of CSC II arising from two separate transactions as part of a plea agreement which required the prosecutor to dismiss a second and third count of CSC in one of the cases.

2. On December 10, 2001, Defendant appeared in this Court for sentencing at which time consecutive sentences of 24 months to 15 years and 57 months to 15 years (81 months to 30 years) were imposed.

3. On or about December 11, 2001, Defendant filed a handwritten motion to withdraw pleas. Said motion had been prepared by another prisoner without benefit of the trial record and was inaccurate in content and form.

4. On December 21, 2001, this Court issued an Order DENYING appointment of counsel at public expense.

5. On March 18, 2002, this Court issued an order to the clerk to prepare copies of the records and files in the cases and provide them to the Defendant.

6. Defendant, who, according to the record, required special education due to learning disabilities, eventually obtained assistance from a different prisoner who reviewed the documents provided by the clerk in response to the Court's March 18, 2002 Order.

7. It appears that review of the record establishes that Defendant's trial counsel, ROD O'FARRELL (P23539), although retained, was so preoccupied with other matters, e.g. **United States v. Francis Darrell Hayden**, Case No. 99-CR-20011-BC; **People v. Timothy Burch**, Case No. 01-19568-FC, that the time and attention extended to this Defendant's case was so nominal as to be easily seen as ineffective. Attached as Defendant's Exhibits 1, 2, 3, and 4 are copies of four Motions to Adjourn trial counsel filed due to his dedication to other cases he was more interested in litigating.

8. Also attached as Defendant's Exhibits 5 and 6 are copies of the two separate SENTENCING INFORMATION REPORTS with written analysis of errors in the scoring which trial counsel failed to detect and challenge although proper evaluation prior to sentencing would have exposed the errors and resulted in significantly lesser sentences.

9. The Sentencing Information Reports now at issue appear to have been prepared by DEBRA KAY HALL, who, while possibly experienced as a bureaucratic paper pusher, IS NOT AN ATTORNEY and was motivated by subjective personal passions to color Defendant in the most absolutely worst light possible and misapplied various criteria in the scoring of the sentencing guidelines in manners which render the sentences unlawful.

10. Trial counsel's preoccupation with other matters made him inattentive to his responsibilities to Defendant and left Defendant, a mentally impaired person, essentially without representation during plea negotiations and sentencing.

11. In order to obtain relief or alternatively to preserve these issues for appeal, Defendant is required to present the issues to this court for consideration, MCR 6.429(C).

13. Due to only having recently obtained the records and careful review, Defendant has not been able to present these challenges at an earlier time.

14. The time for filing an Application for Leave to Appeal has not expired and this Court has the authority to exercise jurisdiction and APPOINT COUNSEL to assist Defendant to develop and present the issues to the trial court and if necessary to file an Application for Leave to Appeal.

RELIEF

WHEREFORE, Defendant humbly prays this Honorable Court will GRANT his request and APPOINT COUNSEL to assist him seek post-conviction relief of INEFFECTIVE ASSISTANCE of TRIAL COUNSEL and resulting Sentencing errors, or alternatively, REMAND this case for Resentencing under properly scored guidelines with all original parties participating.

Respectfully submitted,

Antonio D. Halbert #382400
Antonio D. Halbert, #382400
Defendant in pro per
Muskegon Correctional Facility
2400 S. Sheridan Rd.
Muskegon, MI 49442-6298

Dated: Sept. , 2002.

Approved, SCAO

STATE OF MICHIGAN COURT OF APPEALS	APPLICATION FOR LEAVE TO APPEAL AFTER SENTENCING ON PLEA OF GUILTY OR NOLO CONTENDERE	10TH CIRCUIT COURT SAGINAW COUNTY CASE NO: 00-19193/01-20597-FH

THE PEOPLE OF THE STATE OF MICHIGAN v

Defendant's name, address, and inmate no.
Antonio Dwayne Halbert, #382400
Muskegon Correctional Facility
2400 S. Sheridan Rd
Muskegon, MI 49442-6298

Using the information from your judgment of sentence form, enter the number of the circuit court, the county, and the case number in the upper right-hand corner. Follow the instructions for each of the items. Print or type all information.

STATEMENT OF DELAY

1. This application is being filed more than 21 days after entry of the judgment of sentence because:
   - [X] I did not know until recently that I could appeal the decision.
   - [ ] I could not afford the postage and copying costs to file this application.
   - [X] I did not know until recently how to appeal the decision.
   - [X] I needed to get help to complete this application.
   - [X] Other: I was awaiting a decision on a motion filed in the trial court. (Explain)

APPLICATION

2. I was found guilty on 11-7-01 (Date) of the crime(s) as stated below:

Count	PLEA G	PLEA NC	CRIME	CHARGE CODE(S) MCL citation/PACC Code
1		XX	2ND DEGREE CSC-U/13	750.520C1A
1		XX	CSC 2ND DEGREE-RELAT	750.520C1B

*Plea: Check "G" for guilty plea; check "NC" for nolo contendere

3. I was sentenced as stated below by Judge ROBERT L. KACZMAREK (Name of judge)

Count	SENTENCE DATE	MINIMUM Years	MINIMUM Mos.	MINIMUM Days	MAXIMUM Years	MAXIMUM Mos.	DATE SENTENCE BEGINS	JAIL CREDIT Mos.	JAIL CREDIT Days	OTHER INFORMATION
1	12-10-01		24		15		12-10-01		164	PRIOR TO 01-20597-FH-2
1	12-10-01		57		15		12-10-01		0	CONSECUTIVE TO 00-19193-FH-2

4. [X] I filed with the trial court a request for appointment of an attorney and affidavit of indigency on 12-18-01/9-6-02 (Date)

70b

continued on page 2

5. STATEMENT OF QUESTIONS INVOLVED

State the issues that you want the Court of Appeals to review, such as how you believe the circuit court erred in accepting your plea or imposing the sentence. If you need more space, attach additional pages.

Defendant-Appellant is requesting the Court of Appeals to review the trial court record for a claim of ineffective assistance of counsel which resulted in Defendant-Appellant receiving sentences which were calculated on erroneously scored sentencing guidelines and much harsher sentences than what should have been considered and/or imposed under the facts and circumstances in this case.

Defendant-Appellant would also ask this court to consider if the sentencing court has a duty to ensure that trial counsel and the prosecutor evaluate the scoring of the sentencing guidelines in order to ensure that where the guidelines have been prepared by a person without legal training, the guidelines have been properly scored.

Finally, trial counsel failed to ensure that Defendant-Appellant understood things properly

6. STATEMENT OF FACTS

Give any facts not stated in items 2, 3, and 4 on page 1 that are relevant to this appeal. You must also state the transcript pages or other parts of the record that support your facts. If you need more space, attach additional pages.

Although Defendant-Appellant was represented by retained counsel, the record will show that counsel was so involved in other cases for other clients that the representation afforded this Defendant-Appellant was perfunctory and superficial. Due to trial counsel's preoccupation with other clients' cases, trial counsel failed to evaluate the sentencing guidelines and allowed improper and unlawful procedures to be employed in dealing with the cases and sentences imposed on Defendant-Appellant. Attached Appendix "G" is a copy of Defendant-Appellant's "Motion for Appointment of Counsel and Remand for Evidentiary Hearing/Resentencing" which has been sent to the trial court but for which no acknowledgment has been provided. This pleading more fully explains these issues. This application is being submitted to avoid expiration of time limits.

continued on page 3

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7. ARGUMENTS

For each issue listed in item 5, on page 2, state the law that supports your position and explain how the law applies to the facts of your case. If you need more space, attach additional pages.

Cuyler v. Sullivan, 446 US 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); Perillo v. Johnson, 79 F.3d 441 (5th Cir 1996); US v. Ellison, 798 F.2d 1102 (7th Cir 1986); Blanco v. Singletary, 943 F.2d 1477 (11th Cir 1991), The foregoing cases relate to trial counsel being ineffective because of having other interests which prevented effective advocacy for Defendant-Appellant. Lopez v. Scully, 58 F.3d 38 (2nd Cir 1995); Smith v. Stewart 140 F.3d 1263 (9th Cir 1998); Riascos-Prado v. US, 66 F.3d 30 (2nd Cir 1995), These cases relate to trial counsel's failure to ensure that Defendant-Appellant was treated fairly and lawfully in relation to sentencing. Townsend v. Burke, 334 US 736, 68 S.Ct. 1252 92 L.Ed 1690 (1948); US v. Lewis, 68 F.3d 987 (6th Cir 1995); US v. Tabares, 86 F.3d 326 (3rd Cir 1996); US v. Takai, 941 F.2d 738 (9th Cir 1991); Correll v. Stewart, 137 F.3d 1404

(continued next pag

8. RELIEF REQUESTED

State what you want the Court of Appeals to do.

I pray the Court REMAND this case to the trial court for consideration of the issues presented in his Motion for Appointment of Counsel and Remand for Evidentiary Hearing/Resentencing, or alternatively, that the Court REMAND the case for resentencing under proper procedures as the facts of this case requires.

Date

Signature

PROOF OF SERVICE

I certify on this date a copy of this application and appropriate attachments were served on the prosecutor of

_____ County by ☐ personal service. ☐ mail.

Date

Signature

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(9th Cir. 1998), these cases involve the scoring of the sentencing guidelines, inaccurate information used in determining the sentence to be imposed, and the defendant's mental condition.

In addition to the federal caselaws cited above, Defendant-Appellant would request the Court to consider the following relevant state court caselaw:

People v. Najar, 229 Mich App 393 (1998); People v. Love, 144 Mich App 374 (1985); People v. Jackson, 95 Mich App 565 (1980); People v. Hernandez, 443 Mich 1, (1993); People v. Dowdy, 148 Mich 517 (1986); And the following federal and state constitutional rights, U.S. Const. Amends IVX, V, and VI: Mich Const. 1963, Art I, Secs. 17, 20.

As Defendant-Appellant requests appellate review of the performance of his trial counsel for ineffectiveness resulting in serious abuses and procedural errors that deprived him of proper sentencing on each conviction in a fair and lawful manner, and the mental state of Defendant-Appellant was established as having been deficient, the trial court record requires development for preservation.

The trial court has previously denied appointment of counsel for appeal and where the case now requires inquiry into the scoring of the sentencing guidelines and the performance of trial counsel in regards to ensuring Defendant was treated fairly during the sentencing phases of his separate convictions.

Defendant-Appellant also requests this Court to consider that this application for leave to appeal involves consecutive sentences which were computed in tandem and as one at the same time. Thus the sentences should be reviewed for proportionality as set forth in People v. Kent, 194 Mich App 295 (1992); People v. Warner, 190 Mich App 734 (1991).

1

COVER LETTER

February 21, 2003
(Put Today's Date)

Clerk
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: People v Antonio Halbert (The name you were convicted under goes here.)
Supreme Court No. _____ (Leave blank – the Clerk will assign a number for you.)
Court of Appeals No. 244756 (Get this number from the Court of Appeals decision.)
Trial Court No. 01-20597/00-19193-FH (Get this number from Court of Appeals brief or Presentence Investigation Report.)

Dear Clerk:

Enclosed please find the original of the pleadings checked below. (Put a check mark by the items you are sending.) I am indigent and can not provide seven copies. Please file them.

- [X] Affidavit of Indigency/Proof of Service
- [X] (Delayed) Pro Per Application for Leave to Appeal
- [X] Court of Appeals Decision (You must enclose a copy of the Court of Appeals decision.)
- [X] Court of Appeals Brief (This is not necessary, but it is a good idea.)
- [ ] Supplemental Court of Appeals Brief (This is not necessary, but it is a good idea.)
- [X] Other TRIAL COURT MOTION FOR APPOINTMENT OF COUNSEL AND REMAND FOR EVIDENTIARY HEARING/RESENTENCING / ORDER DENYING SAME

Thank you.

Sincerely,

Antonio D. Halbert
(Sign here)

Antonio D. Halbert
(Print Name)

382400
(Prisoner Number)

2400 S. Sheridan Rd
(Address)

Muskegon, MI 49442-6298
City, State, Zip Code)

INSTRUCTIONS

1. You will need 2 copies and the original of this letter and the pleadings listed above.
2. Mail the original of this letter and all the pleadings listed above to the Supreme Court Clerk.
3. Mail 1 copy of letter and pleadings to the prosecutor in the county where you were convicted.
4. Keep 1 copy of letter and pleadings for your file.

Copy sent to:

IN THE SUPREME COURT FOR THE STATE OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff–Appellee,
v
Antonio D. Halbert
(Print the name you were convicted under on this line.)
Defendant–Appellant.

Supreme Court No. _____ (Leave blank.)
Court of Appeals No. 244756 (Get this from the Court of Appeals decision or brief.)
Trial Court No. 01-20597/00-19193-FH (Get this number from Court of Appeals brief or Presentence Investigation Report.)

(DELAYED) PRO PER APPLICATION FOR LEAVE TO APPEAL

INSTRUCTIONS: Answer each question. Add more pages if you need more space. You MUST send a copy of the Court of Appeals decision. Your application must be RECEIVED by the Supreme Court no more than 56 days from the date stamped on the Court of Appeals decision.

1. I was found guilty on (date of plea or verdict) November 7, 2001
2. I was convicted of (name of offense(s)) 2nd Degree CSC - U/13 and CSC 2nd Degree - RELAT
3. I had a XX (Mark one.) guilty plea; ___ no contest plea; ___ jury trial; ___ trial by judge.
4. I was sentenced by Judge Robert L. Kaczmarek (name of judge) on December 10, 2001 (date you were sentenced) in the Saginaw (name of county where you were sentenced; for crimes in Detroit, put Recorder's Court) County Circuit Court to 2 (minimum sentence) years ___ months to 15 (maximum sentence) years ___ months, and 4 (minimum sentence) years 9 months to 15 (maximum sentence) years ___ months.

I am in prison at the Muskegon Correctional Facility (name of prison) in Muskegon (city), Michigan.

5. The Court of Appeals affirmed my conviction on January 13, 2003 (date stamped on Court of Appeals decision) in case number 244756 (number on Court of Appeals decision). A copy of that decision is attached.
6. ___ This application is filed on time. (Check here if the Court will receive it within 21 days from the Court of Appeals decision.)

   XX This application is filed late. (Check here if the Court will receive it more than 21 days but within 56 days from the Court of Appeals decision.) It is late because: (Check all the reasons that apply. You can add others.)

   XX I had to find help.
   ___ I could not get postage and supplies to file this application.
   XX I am not experienced or educated in the law.
   ___ I did not receive my decision from my attorney in time.
   XX Other. Explain It took time to obtain legal books.

GROUNDS – ISSUES RAISED IN COURT OF APPEALS

7. I want the Court to consider the issues as raised in my Court of Appeals brief and the additional information below.

(DELAYED) PRO PER APPLICATION FOR LEAVE TO APPEAL cont.

Antonio D. Halbert, Defendant–Appellant | Court of Appeals No. 244756

INSTRUCTIONS: In the part below, only bring up issues that were in your Court of Appeals brief. Attach a copy of your Court of Appeals brief if possible. If you prepared a supplemental brief which was filed in the Court of Appeals, those issues go in this part also. You should attach a copy of that brief, too, if you can. New issues go in question 8 which starts on page 7.

ISSUE I:

A. (Copy the headnote, the title of the issue, from your Court of Appeals brief.)

Defendant-Appellant was denied effective assistance of counsel at sentencing resulting in a sentence which was based upon improperly scored sentencing guidelines and a combined consecutive sentence which exceeded appropriate scores.

B. The Court should review the Court of Appeals decision on this issue because: (Check all the ones you think apply to this issue, but you must check at least one.)

X 1. The issue raises a serious question about the legality of a law passed by the legislature.
X 2. The issue raises a legal principle which is very important to Michigan law.
X 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.
X 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think the choices you checked in B apply to this issue. List any cases that you want the Supreme Court to consider. State any facts which you want the Court to consider. If you think the Court of Appeals mixed up any facts about this issue, explain here. If you need more space, you can add more pages.)

The new Michigan Sentencing Guidelines have the force of law and DUE TO MY TRIAL ATTORNEY BEING PREOCCUPIED WITH OTHER CASES THAT WERE MORE IMPORTANT TO HIM AS REFLECTED IN HIS MOTIONS AND LETTERS (included as exhibits to attachments), he failed to conduct adequate review and investigation into the scoring of the guidelines and allowed the scoring of two separate convictions on two separate cases to be scored in a manner that was unlawful and unconstitutional. If my guidelines had been properly scored as required by law, I would have less than half the prison time I was ordered to serve. Please see People v Harmon, 248 MA 522 (2001); Strickland v Washington, 466 US 668 (1984); Glover v US, 531 US 198 (2001), MCL 769.34(2), (10).

(DELAYED) PRO PER APPLICATION FOR LEAVE TO APPEAL cont.

Antonio D. Halbert, Defendant–Appellant | Court of Appeals No. 244756

REMEMBER: In the part below, only bring up issues that were in your Court of Appeals brief. Attach a copy of your Court of Appeals brief if possible. If you prepared a supplemental brief which was filed in the Court of Appeals, those issues go in this part also. You should attach a copy of that brief, too, if you can. New issues go in question 8 which starts on page 7.

ISSUE II:

A. (Copy the headnote, the title of the issue, from your Court of Appeals brief.)

The trial court should ensure that the sentencing guidelines are evaluated for correctness so that the appropriate minimum sentencing range is applied.

B. The Court should review the Court of Appeals decision on this issue because:
(Check all the ones you think apply to this issue, but you must check at least one.)

__ 1. The issue raises a serious question about the legality of a law passed by the legislature.
X 2. The issue raises a legal principle which is very important to Michigan law.
X 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.
__ 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think the choices you checked in B apply to this issue. List any cases that you want the Supreme Court to consider. State any facts which you want the Court to consider. If you think the Court of Appeals mixed up any facts about this issue, explain here. If you need more space, you can add more pages.)

The Michigan Legislature and Courts have enacted and implemented laws to determine the appropriate sentence for certain offenses are tailored to not only the offense but to the offender as well. However, in my case, the sentencing guidelines were prepared by a person who abandoned the role of a fair and impartial clerk and did further simply calculate the guidelines in a clearly erroneous manner. Specifically, the first conviction was scored as though the second conviction PRECEEDED it and the same was done in reverse for the second conviction. Since the court failed to ensure that the guidelines were appropriately scored, I am entitled to appellate review, Harmon, supra. MCL 769.34(10) ; Glover, supra.

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plsm 6.1.90

(DELAYED) PRO PER APPLICATION FOR LEAVE TO APPEAL cont.

Antonio D. Halbert, Defendant–Appellant | Court of Appeals No. 244756

NEW ISSUE I:

A. (State the new issue you want the Court to consider.)

Under the circumstances of my case and the issues being raised, I am entitled to appointment of counsel to assist me in seeking appellate review of the sentences since I am seeking to challenge the scoring of the sentencing guidelines and question the effectiveness of trial counsel.

B. The Court should review this issue because:
(Check all the ones you think apply to your case, but you must check at least one.)

__ 1. The issue raises a serious question about the legality of a law passed by the legislature.
X 2. The issue raises a legal principle which is very important to Michigan law.
X 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.
__ 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think that your choices in B above apply to this issue in your case. List any cases and citations, laws, or court rules, etc. which support your argument. Explain how they apply to this issue. State the facts which support and explain this issue. If these facts were not presented in court, explain why. You can add more pages.)

Although I entered a guilty plea and there was no sentencing agreement(s), I am still entitled to appeal the scoring of the sentencing guidelines. Especially where as here, I did not have effective assistance of counsel in relation to sentencing. My trial counsel did nothing more than go through the motions in a perfunctory manner. The trial court refused to appoint counsel to assist me appeal the scoring of the sentencing guidelines, this is erroneous under People v Najar, 229 MA 393 (1998); People v Bulger, 462 Mich 495, 505 (2000); Tesmer v Granholm, 295 F.3d 536 (6th Cir 2002); MCL 769.34(10).

RELIEF REQUESTED

9. For the above reasons I request that this Court *GRANT* leave to appeal, *APPOINT* a lawyer to represent me, and *GRANT* any other relief it decides I am entitled to receive.

February 21, 2003 (Date) | [Sign Name] (Sign Name)

Antonio D. Halbert (Print Name) | 382400 (Prison Number)

2400 S. Sheridan Rd (Address) | Muskegon, MI 49442-6298 (City, State, Zip Code)

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IN THE SUPREME COURT FOR THE STATE OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff–Appellee,

v

Antonio D. Halbert
(Print the name you were convicted under on this line.)

Defendant–Appellant.

Supreme Court No. _____
(Leave blank.)

Court of Appeals No. 244756
(Get this from the Court of Appeals decision or brief.)

Trial Court No. 01-20597/00-19193-FH
(Get this number from Court of Appeals brief or Presentence Investigation Report.)

AFFIDAVIT OF INDIGENCY

1. My name is Antonio D. Halbert
2. I am in prison at Muskegon Correctional Fac. (Name of prison) in Muskegon (City), Michigan.
3. My prison number is 382400
4. Income and Assets: (Check the ones which apply to you.)

X My only source of income is from my prison job.

___ I have no income.

X I have no assets (stocks, bonds, property) which can be quickly changed into cash.

X I can not pay the filing fee for the attached application.

I ask this Court to waive the filing fee in this matter.

I declare that the statements above are true to the best of my knowledge, information and belief.

Date: February 21, 2003

[signature]
(Sign here)

Antonio D. Halbert
(Print name)

PROOF OF SERVICE

On February 21, 2003 I mailed by U.S. mail one copy of the documents checked below: (Put a check mark by the ones you mailed.)

X Affidavit of Indigency and Proof of Service

X (Delayed) Pro Per Application for Leave to Appeal with a copy of Court of Appeals Decision

X Court of Appeals Brief

___ Supplemental Court of Appeals Brief

TO: Saginaw (Fill in the county where you were convicted.) County Prosecutor, at

111 South Michigan Ave (Address), Saginaw (City), MI 48602 (Zip Code)

I declare that the statements above are true to the best of my knowledge, information and belief.

Date: February 21, 2003

[signature]
(Sign here)

Antonio D. Halbert
(Print name)

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(12)

FILED
JAN 21 2005
OFFICE OF THE CLERK

No. 03-10198

In The Supreme Court of the United States

ANTONIO DWAYNE HALBERT,

Petitioner,

v.

MICHIGAN,

Respondent.

On Writ Of Certiorari To The Michigan Court Of Appeals

JOINT APPENDIX

DAVID A. MORAN*
WAYNE STATE UNIVERSITY LAW SCHOOL
471 West Palmer
Detroit, Michigan 48202
(313) 577-4829
(313) 577-2620 fax
Counsel for Petitioner

MICHAEL A. COX
Michigan Attorney General

THOMAS L. CASEY*
Michigan Solicitor General
P.O. Box 30212
Lansing, Michigan 48909
(517) 373-1124
(517) 335-4523 fax
Counsel for Respondent

**Counsel of Record*

Petition For Writ Of Certiorari Filed November 20, 2003
Certiorari Granted January 7, 2005

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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RELEVANT DOCKET ENTRIES

STATE OF MICHIGAN,
CIRCUIT COURT, COUNTY OF SAGINAW

CASE: 00-019193-FH OFFENSE: 6/27/00

DATE	ACTIONS, JUDGMENTS, CASE NOTES
7/07/2000	COMPLAINT FILED
	* * *
7/20/2000	ADJ PE, WAIVED 14 DAY SETTING, RE-SET PRELIM
	* * *
8/18/2000	PRELIM EXAM SCHEDULED FOR 9/26/2000 AT 10:15 AM
	* * *
9/26/2000	ADJOURNED PRELIM EXAM ORIG. SCHED. 9/26/2000 PRELIM EXAM SCHEDULED FOR 10/19/2000 AT 1:39 PM
	* * *
10/19/2000	PRELIM WAIVED, BOCC PRE-LIMINARY EXAM WAIVED
	* * *
11/07/2001	CT. REPORTER: K. TAGGET, CSR-3584 DFDT PLEAD GUILTY TO DEF W/ATTY R. O'FARRELL, PROS. P. MARSHALL; DEF PLED NOLO CONTENDRE [sic] TO CT 1, CSC2D DEGREE; PROS. RECOMMENDS CTS 2 & 3 BE DISMISSED AT SENTENCING; PROS. RECOMMENDS CONSECUTIVE SENTENCING W/01-20597-FH-2; COURT ACCEPTED NC PLEA; REF'D TO DOC (DEF ATTY REQUESTS CONC. SENTENCE (POLICE RPT SUBMITTED FOR COURT REVIEW)

11/07/2001 REFERRED TO DEPARTMENT OF CORRECTIONS
NOLLE CONTENDRE [sic] PLEA 01-00 2ND DEG CSC-U/13
SENTENCE SCHEDULED FOR 12/10/2001 AT 10:15 AM
DEFN INFO CHANGED BY CIRCUIT COURT PROBATION

* * *

12/10/2001 CT. REPORTER: T. STEMLER, CSR-4023
SENTENCED
DEF W/ATTY RODNEY O'FARRELL, PROS. COPPOLINO, DOC REPR; DEF SENTENCED TO 24 MOS MIN/15 YEARS MAX, CREDIT FOR 164 DAYS; PAY $60 VRF W/IN 30 DAYS; TO BE SERVED PRIOR TO AND CONSECUTIVE W/01-20597-FH-2

12/10/2001 NOLLE PROS 02-00 2ND DEG CSC-U/13
NOLLE PROS 03-00 2ND DEG CSC-U/13
MOTION/ORDER OF NOLLE PROSEQUI
NOTICE OF APPEAL RIGHTS PROVIDED TO DEFENDANT
COUNT 01-00 SENTENCED

* * *

12/17/2001 DEFENSE MOTION
MTN TO WITHDRAW PLEA; NTC HRG 12/17/01

12/18/2001 REQUEST FOR APPELLATE ATTY
FORWARDED O-A-C
OPINION AND ORDER Of THE COURT DENIES DEF'S MTN TO WITHDRAW PLEA

12/21/2001 ORDER DENYING DEF'S REQUEST FOR APPT. OF COUNSEL TO FILE APPL. LEAVE TO APPEAL

* * *

3/22/2002 TRANSCRIPT OF SENTENCE 12/10/01

* * *

7/30/2002 TRANSCRIPT OF PLEA (11-7-01) FILED BY KATHRYN TAGGET CS

* * *

9/11/2002 DEFENSE MOTION
MTN FOR APPOINTMENT OF COUNSEL; MTN FOR EVIDENTIARY HRG RESENTENCING

10/25/2002 OPINION AND ORDER OF THE COURT DENYING DEFT'S MTN FOR APPOINTMENT OF APPELLATE COUNSEL

* * *

STATE OF MICHIGAN, CIRCUIT COURT,
COUNTY OF SAGINAW

CASE: 01-020597-FH OFFENSE: 7/17/2001

DATE	ACTIONS, JUDGMENTS, CASE NOTES
7/18/2001	COMPLAINT FILED
	* * *
9/12/2001	PRE-LIMINARY EXAM WAIVED CTS 01-00; PRELIM WAIVED, BOND CONT'D, BOCC
	* * *
11/07/2001	CT. REPORTER: K. TAGGET, CSR-3584 DFDT PLEAD GUILTY TO DEF W/ATTY R. O'FARRELL, PROS. P. MARSHALL, DOC REPR; D PLED NOLO CONTENDRE [sic] TO CSC 2ND DEGREE/VICTIM SHAVONNE HARRIS; POLICE REPORT PROVIDED TO COURT FOR CONSIDERATI [sic] PROS. REQUESTS CONSECUTIVE SENTENCING W/00-10193-FH-2, DEF ATTY REQUESTS CONCURRENT; COURT ACCEPTED NC PLEA
11/07/2001	NOLLE CONTENDRE [sic] PLEA 01-00 CSC 2ND DEGREE – RELAT SENTENCE SCHEDULED FOR 12/10/2001 AT 10:15 AM DEFN INFO CHANGED BY CIRCUIT COURT PROBATION
	* * *
12/10/2001	CT. REPORTER: T. STEMLER, CSR-4023 SENTENCED DEF W/ATTY O'FARRELL, PROS. COPPOLINO, DOC REPR; DEF SENTENCED TO 57 MOS. MIN/15 YEARS MAX, TO BE SERVED FOLLOWING & CONSECUTIVE W/00-19193-FH-2, NO CREDIT FOR TIME SERVED; $60 VRF W/IN 30 DAYS
12/10/2001	NOTICE OF APPEAL RIGHTS PROVIDED TO DEFENDANT COUNT 01-00 SENTENCED
	* * *
12/17/2001	DEFENSE MOTION MTN TO WITHDRAW PLEA; NTC HRG 12/17/2001, 8:30
12/18/2001	OPINION AND ORDER OF THE COURT DENIES DEF'S MTN TO WITHDRAW PLEA
12/18/2001	REQUEST FOR APPELLATE ATTY FORWARDED O-A-C
12/21/2001	ORDER DENYING APPOINTMENT OF APPELLATE ATTORNEY
	* * *
4/15/2001	TRANSCRIPT OF SENTENCE 12/10/01, FILED BY TRACY M STEML
	* * *
7/30/2002	TRANSCRIPT OF PLEA (11-7-01) FILED BY KATHRYN TAGGET CS
9/11/2002	DEFENSE MOTION MTN FOR APPOINTMENT OF COUNSEL; MTN FOR EVIDENTIARY HRG RESENTENCING
10/25/2002	OPINION AND ORDER OF THE COURT DENYING DEFT'S MTN FOR APPOINT- MENT OF APPELLATE COUNSEL
	* * *

MICHIGAN COURT OF APPEALS

11/5/2002	**1**	**Delayed App for Leave – Criminal** Filed By Pro Per
		* * *
1/13/2003	**12**	**Order: Application – Deny – Delayed App for Leave**
		* * *

MICHIGAN SUPREME COURT

DATE	PROCEEDINGS
2003	
Feb 25	Delayed Application for Leave to Appeal filed.
	* * *
Sep 19	Ordered, Application for Leave to Appeal DENIED.
	* * *

STATE OF MICHIGAN
JUDICIAL DISTRICT
10th **JUDICIAL CIRCUIT**

INFORMATION
FELONY

CASE NO.

DISTRICT CIRCUIT 00-019193 FH-2

District Court ORI: **MI-** Circuit Court ORI: **MI-**

Defendants name and address

THE PEOPLE OF THE STATE OF MICHIGAN v ANTONIO DWAYNE HALBERT
2545 BEWICK
SAGINAW, MI 48601

Victim or complainant
LORETTA PRICE

Complaining witness
LORETTA PRICE

Co-defendant(s)

Date On or ~~about~~ before
6/27/00

City/Twp/Village County in Michigan
VARIOUS LOCATIONS IN SAGINAW COUNTY

Defendant CTN Defendant SID
73 00 004569 01

Defendant DOB Police agency report no.
12/30/67 856 2223-00

Charge Maximum penalty Defendant DLN

Witnesses

* LORETTA PRICE
* R. WEATHERSPOON
K. MCINERNEY
* SHAVONNE HARRIS
* SHARNAE PERRY
* ALEXANDRIA BEVERLY

* MARIA MCKINNEY
* FRED CAVAZOS
* JAMES BAKER
* ERICA FAIRRES
* DWAYNE FAIRRES
* EBONIE MCKINNEY
WAVONNE HALBERT
* HELEN DRAKE

STATE OF MICHIGAN, COUNTY OF Saginaw

IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN: The prosecuting attorney for this County appears before the court and informs the court that on the date and at the location described, the defendant:

COUNT I – SECOND DEGREE CRIMINAL SEXUAL CONDUCT – PERSON UNDER THIRTEEN

One Antonio Dwayne Halbert, late of the County of Saginaw, State of Michigan did engage in sexual contact with another person, to-wit: Maria McKinney at the Buena Vista Community Center at 1940 S. Outer Drive on June 27, 2000, said person being under 13 years of age; Contrary to Sec. 750.520c(1)(a); M.S.A. 28.788(3)(1)(a).(750.520C1A)

HIV/STD TESTING NOTICE

Take Notice that pursuant to MCL 333.5129; NSA 14.15(5129), upon bindover to circuit court or recorder's court, the district court judge shall order the defendant to be tested for venereal disease, hepatitis B infection, and for the presence of HIV or an antibody to HIV if the judge determines there is reason to believe the violation involved sexual penetration or exposure to a body fluid of the defendant. If the district judge determines that testing is not required, upon conviction the court must order the defendant to be tested.

FELONY: 15 years; mandatory AIDS/STD testing

COUNT II – SECOND DEGREE CRIMINAL SEXUAL CONDUCT – RELATIONSHIP

One Antonio Dwayne Halbert, late of the County of Saginaw, State of Michigan did engage in sexual contact with another person, to-wit: Shavonne Harris. at 2545 Bewick, on a date in April or May 2000, said victim being at least 13 but less than 16 years of age, to-wit: 13 years old, and the defendant being a member of the same household as the victim; Contrary to Sec. 750.520c(1)(b); M.S.A. 28.788(3)(1)(b).(750.520C1B)

HIV/STD TESTING NOTICE

Take Notice that pursuant to MCL 333.5129; MSA 14.15(5129), upon bindover to circuit court or recorder's court, the district court judge shall order the defendant to be tested for venereal disease, hepatitis B infection, and for the presence of HIV or an antibody to HIV if the judge determines there is reason to believe the violation involved sexual penetration or exposure to a body fluid of the defendant. If the district judge determines that testing is not required, upon conviction, the court must order the defendant to be tested.

FELONY: 15 years; mandatory AIDS/STD testing

COUNT III – SECOND DEGREE CRIMINAL SEXUAL CONDUCT – PERSON UNDER THIRTEEN

One Antonio Dwayne Halbert, late of the County of Saginaw, State of Michigan did engage in sexual contact with another person, to-wit: Shar'nae Perry, at 2545 Bewick, on a date in June 2000, said person being under 13 years of age; Contrary to Sec. 750.520c(1)(a); M.S.A. 28.788(3)(1)(a). (750.520C1A)

HIV/STD TESTING NOTICE

Take Notice that pursuant to MCL 333.5129; MSA 14.15(5129), upon bindover to circuit court or recorder's court, the district court judge shall order the defendant to be tested for venereal disease, hepatitis B infection, and for the presence of HIV or an antibody to HIV if the judge determines there is reason to believe the violation involved sexual penetration or exposure to a body fluid of the defendant. If the district judge determines that testing is not required, upon conviction the court must order the defendant to be tested.

FELONY: 15 years; mandatory AIDS/STD testing

*The People intend to produce at trial those witnesses designated by asterisk pursuant to 1986 PA 46.

and against the peace and dignity of the State of Michigan.

Prosecuting Attorney

11/2/00
Date

By: /s/ Barbara L. Meter
BARBARA L. METER

STATE OF MICHIGAN

IN THE 10TH CIRCUIT COURT
FOR THE COUNTY OF SAGINAW

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff,

v. File No.: 00-19193-FH
HON. ROBERT L. KACZMAREK

ANTONIO HALBERT,

Defendant.

_____/

MICHAEL D. THOMAS (P23539)
Attorney for Plaintiff
111 South Michigan Avenue
Saginaw, Michigan 48602
(989) 790-5330

ROD O'FARRELL (P24899)
Attorney for Defendant
1609 Court Street
Saginaw, Michigan 48602
(989) 792-9767

_____/

STIPULATION AND ORDER TO ADJOURN TRIAL SCHEDULED FOR JUNE 12, 2001

IT IS HEREBY STIPULATED AND AGREED BY Attorney for the People of the State of Michigan, MICHAEL D. THOMAS and Attorney for Defendant, ROD O'FARRELL, that the above entitled cause presently scheduled for trial be adjourned to be reset at a date convenient to all parties, due to Attorney, ROD

O'FARRELL is continuing a multi-defendant drug conspiracy trial in the United States District Court, case being *United States v. Francis Darrell Hayden*, case number 99-CR-20011-BC.

WHEREFORE the parties do stipulate that the trial of this cause presently scheduled be adjourned.

Dated: June 7, 2001 /s/ Kathleen Ann Miller
MICHAEL D. THOMAS
(P23539)
Attorney for Plaintiff

Dated: June 5, 2001 /s/ Rod O'Farrell
ROD O'FARRELL
(P24899)
Attorney for Defendant

STATE OF MICHIGAN
JUDICIAL DISTRICT
10th **JUDICIAL CIRCUIT**

INFORMATION
FELONY

CASE NO.

DISTRICT CIRCUIT 01-020597 FH-2

District Court ORI: MI- Circuit Court ORI: MI-

Defendants name and address

THE PEOPLE OF THE STATE OF MICHIGAN v ANTONIO DWAYNE HALBERT
2545 BEWICK
SAGINAW, MI 48601

Victim or complainant
RUSS UPHOLD

Complaining witness
RUSS UPHOLD

Co-defendant(s)

Date On or about
7/17/01

City/Twp./Village County in Michigan
2545 BEWICK, BUENA VISTA TOWNSHIP

Defendant CTN Defendant SID
73 01 004748 01

Defendant DOB Police agency report no.
12/30/67 856 2825-01

Charge Maximum penalty Defendant DLN

Witnesses

* RUSS UPHOLD
* SHAVONNE CHARLENE HARRIS
BETTY BLONIARCZYK

* ROYANA SILER
* ARETHA BLACKMON
CONNIE CHAPIN
DAZARENE BLEDSON
* CRAIG TUER
* NEIL SOMERS
* DAN REINHARDT

STATE OF MICHIGAN, COUNTY OF Saginaw

IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN: The prosecuting attorney for this County appears before the court and informs the court that on the date and at the location described, the defendant:

SECOND DEGREE CRIMINAL SEXUAL CONDUCT – RELATIONSHIP

One Antonio Dwayne Halbert, late of the County of Saginaw, State of Michigan did engage in sexual contact with another person, to-wit: Shavonne Harris, said victim being at least 13 but less than 16 years of age, to-wit: Age 14 years, and the defendant being related to the victim by blood or affinity to the fourth degree; Contrary to Sec. 750.520c(1)(b); M.S.A. 28.788(3)(1)(b). (750.520C1B)

HIV/STD TESTING NOTICE

Take Notice that pursuant to MCL 333.5129; MSA 14.15(5129), upon bindover to circuit court or recorder's court, the district court judge shall order the defendant to be tested for venereal disease, hepatitis B infection, and for the presence of HIV or an antibody to HIV if the judge determines there is reason to believe the violation involved sexual penetration or exposure to a body fluid of the defendant. If the district judge determines that testing is not required,

upon conviction, the court must order the defendant to be tested.

FELONY: 15 years; mandatory AIDS/STD testing

*The People intend to produce at trial those witnesses designated by asterisk pursuant to 1986 PA 46.

and against the peace and dignity of the State of Michigan.

Prosecuting Attorney

10-8-01
Date

By: /s/ Paul M. Fehrman
PAUL M. FEHRMAN

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF SAGINAW

PEOPLE OF THE
STATE OF MICHIGAN

vs. File Nos. 00-019193-FH-2
01-020597-FH-2

ANTONIO DWAYNE HALBERT,

Defendant.
_____/

PLEA

BEFORE THE HONORABLE ROBERT L. KACZMAREK,
CIRCUIT JUDGE

Saginaw, Michigan – November 7, 2001

APPEARANCES:

For the People: PAMELA A. MARSHALL (P54055)
ASSISTANT PROSECUTING ATTORNEY
111 S. Michigan Avenue Saginaw, MI
48602-2019 (989) 790-5330

For Defendant: RODNEY J. O'FARRELL (P24899)
Attorney at Law 1609 Court Street
Saginaw MI 48602-4070 (989) 792-9767

* * *

[2] MS. MARSHALL: Pamela Marshall for the People.

These matters were set for trial yesterday. We have reached a plea agreement in these cases. It's my understanding the defendant will be pleading guilty to Count I, CSC second-degree under 13 on case 00-19193 and that

should be involving the victim, Maria McKinney. I'm sorry, that's a no contest plea. He will also be pleading no contest to Count I on case 01-020597-FH-2, criminal sexual conduct second-degree, relationship, and that victim is Shayvon Harris.

In exchange for pleas of no contest on those two counts, the People agree to dismiss Count II and Count III on case 00-019193-FH-2. We also recommend the defendant be sentenced within the guidelines and we're requesting consecutive sentencing in this matter that is discretionary with the Court. And it's my understanding defendant will be requesting concurrent sentencing, but we are requesting consecutive.

And the no contest plea – I believe we provided the police reports to the Court. We would both stipulate to those as the basis for the no contest plea, and the reason for the no contest plea is the possibility of civil liability.

MR. O'FARRELL: Your Honor, Rod O'Farrell on [3] behalf Mr. Halbert. That's a correct statement. This is what I have discussed with my client, Your Honor. He does understand it and we do wish to enter a plea of no contest to the two counts as referred to contained in these two cases.

The potential for consecutive sentencing is discretionary with the Court because the second offense occurred while on bond for the first offense, Your Honor. I would state further that the civil liability in this case is active. There is neglect proceedings involving my client and specifically the mother of Shayvon in the second case and that also was affected by the first case since Shayvon was a victim in one of the cases that is being dismissed in that case.

With that being said, Your Honor, I believe my client does understand this agreement and is prepared to enter into the plea of no contest at this time, and we do stipulate to the reports as referred to by the prosecutor.

(Defendant sworn.)

THE COURT: Your name, sir?

THE DEFENDANT: Antonio Halbert, Antonia Dwayne, Halbert.

THE COURT: Are you presently on probation or parole?

[4] THE DEFENDANT: No.

THE COURT: Do you understand the maximum penalty for these offenses is 15 years?

THE DEFENDANT: Yes, sir.

THE COURT: You understand if I accept your no contest plea we'll not have a trial of any kind and you will give up certain rights that you have at a trial?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand you have a right to a trial by a jury?

THE DEFENDANT: Yes, sir.

THE COURT: By entering this plea you are giving up that right.

THE DEFENDANT: Yes, sir.

THE COURT: You also have a right to a trial by the Court without a jury with the consent of both the

prosecutor and the trial judge. You have a right to a non-jury trial.

THE DEFENDANT: Yes, sir, I understand, I do.

THE COURT: By entering these pleas you are giving up that right.

THE DEFENDANT: Yes, sir.

THE COURT: You have a right to be presumed innocent until proven guilty at the trial, do you [5] understand that?

THE DEFENDANT: Yes, sir.

THE COURT: By entering this plea you are giving up that right.

THE DEFENDANT: Yes, sir.

THE COURT: You have a right to have the burden of proving your guilt beyond a reasonable doubt placed on the prosecution throughout the trial, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: By entering this plea you are giving up that right.

THE DEFENDANT: Yes, sir.

THE COURT: You have a right to have the witnesses appear against you, do you understand that?

THE DEFENDANT: Yes, Sir.

THE COURT: By entering this plea you are giving up that right.

THE DEFENDANT: Yes, sir.

THE COURT: You have a right to question the witnesses who appear against you, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: By entering this plea you are giving up that right.

[6] THE DEFENDANT: Yes, sir.

THE COURT: You have a right to have the Court order any witnesses you wished produced for your defense to appear at the trial, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: By entering this plea you are giving up that right.

THE DEFENDANT: Yes, sir.

THE COURT: You have a right to remain silent during the trial; in other words, you don't have to testify. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: By entering this plea you are giving up that right.

THE DEFENDANT: Yes, sir.

THE COURT: You have a right not to have your silence used against you, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: By entering this plea you are giving up that right.

THE DEFENDANT: Yes, sir.

THE COURT: And you have a right to testify at the trial if you want to, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: By entering this plea you are [7] giving up that right.

THE DEFENDANT: Yes, sir.

THE COURT: You understand if I accept your plea you are giving up or waiving any claim of an appeal as of right.

THE DEFENDANT: Yes, sir.

THE COURT: You are also giving up any claim this plea was the result of any promise or consideration which was not placed on the record here in court.

THE DEFENDANT: Yes, sir.

THE COURT: And you are giving up any claim this plea is not of your own free will.

THE DEFENDANT: Yes, sir.

THE COURT: You understand if I accept your plea and you are financially unable to retain a lawyer to represent you on appeal, the Court must appoint an attorney for you if the sentence I impose exceeds the sentencing guidelines or you seek leave to appeal a conditional plea or the prosecutor seeks leave to appeal or the Court of Appeals or Supreme Court grants you leave to

appeal. Under those conditions I must appoint an attorney, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Further, if you are financially [8] unable to retain a lawyer to represent you on appeal, the Court may appoint an attorney for you if you allege an improper scoring of the sentencing guidelines, you object to the scoring at the time of the sentencing and the sentence I impose exceeds the sentencing guidelines as you allege it should be scored. Under those conditions I may appoint an attorney for you, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Now, as I understand what's happening today, in Case Number – the case involving Maria McKinney, you are entering a no contest plea to second-degree criminal sexual conduct.

THE DEFENDANT: Yes, sir.

THE COURT: And in the case – also a case involving Sheyvon Harris, you are entering a no contest plea to second-degree criminal sexual conduct.

THE DEFENDANT: Yes, sir.

THE COURT: In exchange for that, Counts II, III – and in regard to – the Maria McKinney Information would be dismissed.

Further, the People are recommending that you be sentenced within the guidelines, although they are requesting consecutive sentencing and your counsel is indicating he's going to make a request for concurrent [9] sentencing. Is that your understanding of the agreement?

THE DEFENDANT: Yes, sir.

THE COURT: Counsel, have I correctly stated the agreement?

MR. O'FARRELL: You have.

MS. MARSHALL: Yes, Your Honor.

THE COURT: Any other promises or considerations I should be made aware of?

MR. O'FARRELL: There are none.

MS. MARSHALL: People are aware of none.

THE COURT: Has anyone promised you anything beyond what I've stated here on the record to induce you to make this plea?

THE DEFENDANT: No, sir.

THE COURT: Has anyone threatened you in any manner to induce you to make this plea?

THE DEFENDANT: No, sir.

THE COURT: Is it your own choice to plead no contest to both these charges?

THE DEFENDANT: Yes, it is, sir.

THE COURT: The Court has reviewed the preliminary examination in the case involving Maria McKinney and – and I read the police reports involving Shayvon Harris and I find that if the information [10] contained in there were believed by the trier of fact they would prove beyond a reasonable doubt the elements of the two charges here.

Furthermore, because of the potential for civil litigation, the very nature of the case, the no contest plea is appropriate.

Do counsel believe I've complied with the court rule regarding no contest pleas?

MS. MARSHALL: People, are satisfied.

MR. O'FARRELL: Yes, Your Honor.

THE COURT: I will state for the record I have not agreed on a possible plea or possible sentence with the prosecutor, the defendant or anyone acting in the interest of either. I find the plea understandingly made, voluntary and accurate. I'll accept it. I'll refer the matter to the department of corrections for a presentence investigation.

MS. MARSHALL: Thank you.

MR. O'FARRELL: Thank you, Your Honor. (Plea concluded.)

* * *

[11] STATE OF MICHIGAN)
) SS
COUNTY OF SAGINAW)

I, Kathryn A. Tagget, Official Court Reporter, do hereby certify that I reported in shorthand the proceedings held in the above-entitled cause before the Honorable Robert L. Kaczmarek, Circuit Judge, in Saginaw, Michigan

I further certify that the attached and foregoing pages constitute a full, true and correct transcription of my shorthand notes then and there taken.

/s/ Kathryn A. Tagget
Kathryn A. Tagget, RMR, CSR-3584
Official Court Reporter
111 South Michigan Avenue
Saginaw, MI 48602

STATE OF MICHIGAN
IN THE CIRCUIT COURT OF THE
COUNTY OF SAGINAW
[Caption Omitted in Printing]

SENTENCING INFORMATION REPORT

Offender: Halbert, Antonio Dwayne **SSN:** 432-25-3270
Workload: 2310 **Docket Number:** 0019193

Judge: The Honorable Robert Kaczmarek
Bar No.: P15639 **Circuit No.** 10 **County:** 73

Conviction Information

Conviction PACC: 750.520C1A **Offense Title:** CSC, 2nd Degree (Person Under 13)

Crime Group Person **Offense Date:** 12/20/2000

Crime Class: Class C **Conviction Count:** 1 of 2 **Scored as of:** 12/20/2000

Statutory Max: 180 **Habitual:** No **Attempted:** No

Prior Record Variable Score

PRV1: 0 PRV2: 0 PRV3: 0 PRV4: 0 PRV5: 0
PRV6: 0 PRV7: 10

Total PRV: 0
PRV Level: A

Offense Variable

OV1: 0 OV2: 0 OV3: 0 OV4: 0 OV5: 0 OV6: 0
OV7: 0 OV8: 0 OV9: 10 OV10: 10 OV11: 0 OV12: 0
OV13: 25 OV14: 0 OV16: 0 OV17: 0 OV18: 0 OV19: 0

Total OV: 45

OV Level: IV

Sentencing Guideline Range

Guideline Minimum Range: 12 to 24

Minimum Sentence

	Months	Life
Probation:	24	☐
Jail:		
Prison:		☐

Sentence Date: 12-10-01
Guideline Departure: No
Consecutive Sentence: Yes
Concurrent Sentence: Yes

Sentencing Judge: /s/ R.L. Kaczmarek **Date:** 12-10-01

Prepared By: HALL, DEBRA KAY

STATE OF MICHIGAN
IN THE CIRCUIT COURT OF THE
COUNTY OF SAGINAW
[Caption Omitted in Printing]

SENTENCING INFORMATION REPORT

Offender: Halbert, Antonio Dwayne **SSN:** 432-25-3270
Workload: 2310 **Docket Number:** 0120597

Judge: The Honorable Robert Kaczmarek
Bar No.: P15639 **Circuit No.** 10 **County:** 73

Conviction Information

Conviction PACC: 750.520C1A **Offense Title:** CSC, 2nd Degree (Person Under 13)
Crime Group Person **Offense Date:** 7/17/2001
Crime Class: Class C **Conviction Count:** 2 of 2 **Scored as of:** 7/17/2001
Statutory Max: 180 **Habitual:** No **Attempted:** No

Prior Record Variable Score

PRV1: 0 PRV2: 0 PRV3: 0 PRV4: 0 PRV5: 0
PRV6: 10 PRV7: 10

Total PRV: 20

PRV Level: C

Offense Variable

OV1: 0 OV2: 0 OV3: 0 OV4: 10 OV5: 0 OV6: 0
OV7: 0 OV8: 0 OV9: 0 OV10: 10 OV11: 0 OV12: 0
OV13: 25 OV14: 0 OV16: 0 OV17: 0 OV18: 0 OV19: 0

Total OV: 45

OV Level: IV

Sentencing Guideline Range

Guideline Minimum Range: 29 to 57

Minimum Sentence

	Months	Life
Probation:		☐
Jail:		
Prison:		☐

Sentence Date: 12-10-01
Guideline Departure: No
Consecutive Sentence: Yes
Concurrent Sentence: Yes

Sentencing Judge: /s/ R.L. Kaczmarek **Date:** 12-10-01

Prepared By: HALL, DEBRA KAY

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR
THE COUNTY OF SAGINAW

PEOPLE OF THE STATE OF MICHIGAN — File Nos. 00-019193-FH, 01-020597-FH

vs.

ANTONIO D. HALBERT,

Defendant.

SENTENCE

BEFORE THE HONORABLE
ROBERT L. KACZMAREK, CIRCUIT JUDGE

Saginaw, Michigan – December 10, 2001

APPEARANCES:

For the People: BERNARD J. COPPOLINO (P33577)
ASSISTANT PROSECUTING ATTORNEY
111 S. Michigan Avenue
Saginaw, MI 48602-2019
(989) 790-5330

For Defendant: RODNEY J. O'FARRELL (P24899)
Attorney at Law
1609 Court Street
Saginaw MI 48602-4070
(989) 792-9767

[2] December 10, 2001

Saginaw, Michigan

THE COURT: Okay. Sir, you were in court back on November 7th of this year at which time you pled guilty

to two counts of second degree criminal sexual conduct. Is that correct?

THE DEFENDANT: It was no contest, yes, sir.

THE COURT: Have you had a chance to talk to the Department of Corrections about what happened here?

THE DEFENDANT: Have I had a chance to talk with them?

THE COURT: Did you talk to Miss Hall?

THE DEFENDANT: Yes, sir.

THE COURT: Did you review her report?

THE DEFENDANT: Yes, sir.

THE COURT: Is there anything inaccurate in the report?

THE DEFENDANT: No, sir.

THE COURT: Counsel have a chance to review the report?

MR. O'FARRELL: Yes, your Honor. Rod O'Farrell on behalf of Mr. Halbert. I read through it with him the end of last week. It is accurate. We have no additions or corrections.

THE COURT: Anything in addition to the [3] report?

MR. O'FARRELL: No, your Honor, not at this time.

THE COURT: Mr. Coppolino, anything?

MR. COPPOLINO: Your Honor, it's my understanding that a representative of the victim does wish to address the Court.

THE COURT: Okay.

MR. O'FARRELL: Judge, excuse me. When you said in addition to the report, did you mean – you weren't talking about allocution, were you?

THE COURT: Yeah, I was.

MR. O'FARRELL: Oh, I'm sorry. Then I would have some remarks, your Honor.

Your Honor, as the Court is aware, there's an issue in this case of consecutive versus concurrent sentencing. The Court has discretion because this second offense occurred while on bond on the first offense.

Mr. Halbert and his wife had retained me in this case. Mr. Halbert had been on tether throughout the great majority of the time period between the first and the second offense. He had been undertaking counseling with Mr. Gonzales from the Department of Mental Health, and we have received positive reports [4] through that period.

Mr. Halbert recognizes that he has a problem. He has some remarks that he will address to the Court when given the opportunity, but I would ask the Court to sentence him concurrently, your Honor, and I believe that in all the circumstances in this case, that a sentence in the midpoint of the guideline range would be appropriate.

MR. COPPOLINO: Mr. McKinney.

THE VICTIM: Your Honor, my name is Alondo McKinney, parents of Maria McKinney, the victim, and I

think he should get – me, myself, I feel he should get consecutive because you all let him out once and let him go back and do it again. Me, myself, I don't care – that's my child. It could be any child. You don't let nobody out there touching no 12, 13-year-old kid.

THE COURT: Thank you.

MR. COPPOLINO: Your Honor, for the People, we would also be recommending consecutive sentencing given the nature of these offenses.

THE COURT: Sir, anything you want to add?

THE DEFENDANT: Yes, sir. To your Honor and the people of the court, I, Antonio Halbert, would like to say to the people of the court I have been a moral [5] person all my life. I've made a mistake. I have to live with it for the rest of my life. To the families that I have done things to that was unmoral, I am sorry for what I have done. I want to be – I want it to be made known I work and got through school. I would like to still work in society to be the best person I could possibly be. When I get out, I would like to get help, and while incarcerated, I would seek counseling.

I would like the Court to know I am very sorry for what happened, and I'm sorry for this case – for this case had to be presented before you, your Honor. I am a church-going person. I believe in what's right for all people in the world.

I would like another chance to do right for myself and family. I feel I could show the Court what kind of person I really am, and I have the Lord to thank because, with his help, I can become a better person, I will accept the responsibility for what has happened and accept the

punishment by saying to the Court and the families I am sorry.

THE COURT: Okay. In regard to Case Number 0019193, the maximum penalty I'm setting at 15 years, the minimum at 24 months. Consecutive with that on Case Number 0120597, the maximum 15, the minimum at 57 months. These are within the guidelines. Credit for [6] how many – 138 days?

MR. O'FARRELL: I believe the one case has –

THE COURT: 164?

MR. O'FARRELL: Yes.

THE COURT: 164 days credit.

MR. COPPOLINO: And that's – with it being consecutive, then, your Honor, the 164 applies to the first case. Correct?

THE COURT: Correct.

MR. O'FARRELL: Thank you, Judge.

THE COURT: If you wish to appeal either your plea or sentence, I'll give you a form which explains the conditions under which I must appoint an attorney and the conditions under which I may appoint an attorney. The request for the appointment of attorney must be made in writing and sent to the court within 42 days. There's a 60-dollar Victim Rights Fund on each one of them.

THE CLERK: No forensic lab?

THE COURT: I don't believe so.

(Proceedings adjourned.)

[7] STATE OF MICHIGAN)
) SS
COUNTY OF SAGINAW)

I certify that this transcript is a complete, true and correct transcript of the proceedings and testimony taken in this case before the Honorable Robert L. Kaczmarek, Circuit Judge, in Saginaw, Michigan.

/s/ Tracy M. Stemler
Tracy M. Stemler, CSR-4023
Official Court Reporter
111 South Michigan Avenue
Saginaw, MI 48602

JUDGMENT
OF SENTENCE COMMITMENT TO
CORRECTIONS DEPARTMENT

STATE OF MICHIGAN **10TH JUDICIAL CIRCUIT** **SAGINAW COUNTY**		**CASE NO.** 00-019193-FH-2

ORI-**MI-1730015 J**	Court Address	Court Telephone no.
Police Report No.	**111 S. MICHIGAN AVE., SAGINAW, MICHIGAN**	**(517) 790-5471**

THE PEOPLE OF THE STATE OF MICHIGAN	**V**	Defendant's name, address, and telephone no. HALBERT, ANTONIO DWAYNE 2545 BEWICK SAGINAW, MI 48601

CTN	**SID**	**DOB**
73-00-004569-01		12/30/67

Prosecuting attorney name	**Bar no.**
Michael D. Thomas	**P23539**

Defendant attorney name	**Bar no.**
O'FARRELL, RODNEY J.	P24899

THE COURT FINDS:

1. The defendant, represented by counsel, was found guilty on 11/7/01 (Date) of the crimes stated below:

Plea insert "G" for guilty plea; "NC" for nolo contendere, "MI" for guilty but mentally ill • Use "X" if sentence is to be enhanced because of Habitual Offender Act.

Count	CONVICTED BY Plea*	Court*	Jury	CRIME	CHARGE (CODE(S) MCL citation/ PACC Code
1	NC			2nd Dec CSC-U/13	750.520C1A

☐ 2. The conviction is reportable to the Secretary of State under MCL 257.732 or MCL 281.1040.
The defendant's driver license number is: _____

☐ 3. HIV testing was ordered on 12/10/2001 (Date). Confidential test results are on file.

IT IS ORDERED:

4. Defendant is sentenced to custody of Michigan Department of Corrections. This sentence shall be executed immediately.

Count	SENTENCE DATE	MINIMUM Years	Mos.	Days	MAXIMUM Years	Mos.
1	12/10/01		24		15	

DATE SENTENCE BEGINS	JAIL CREDIT Mos.	Days	OTHER INFORMATION
12/10/01		164	PRIOR TO & CONSECUTIVE
			W/01-20597-FH-2

☐ Defendant shall pay restitution of $ _____. If a cash bond/bail was personally posted by the defendant, payment toward restitution is to first be collected out of that bond/bail and allocated as specified under MCL 775.22.

☐ 5. Sentence(s) to be served consecutively to:
☐ each other. ☐ case numbers 01-20597-FH-2.

6. Defendant shall pay a $60.00 assessment for the Crime Victim Rights Fund.

7. Court recommendation:

☐ 8. Defendant shall pay a $150.00 assessment for forensic lab test.

12/11/01 /s/ R. L. Kaczmarek P15639
Date Judge ROBERT L. KACZMAREK Bar no.

Under MCL 769.16a the clerk of the court shall send a copy of this order to the Michigan State Police Central Records Division to create a criminal history record.

I certify that this is a correct and complete abstract from the original court records. The sheriff shall, without needles delay, deliver defendant to the Michigan Department of Corrections at a place designated by the department.

(SEAL) /s/ Linda D. Polzin
Deputy court clerk

JUDGMENT OF SENTENCE COMMITMENT TO CORRECTIONS DEPARTMENT

STATE OF MICHIGAN 10TH JUDICIAL CIRCUIT SAGINAW COUNTY		CASE NO. 01-020597-FH-2

ORI-MI-1730015 J	Court Address	Court Telephone no.
Police Report No.	111 S. MICHIGAN AVE., SAGINAW, MICHIGAN	(517) 790-5471

THE PEOPLE OF THE STATE OF MICHIGAN	V	Defendant's name, address, and telephone no. HALBERT, ANTONIO DWAYNE 1602 WALNUT SAGINAW, MI 48601

CTN	SID	DOB
73-01-004748-01		12/30/67

Prosecuting attorney name	Bar no.
Michael D. Thomas	P23539

Defendant attorney name	Bar no.
O'FARRELL, RODNEY J.	P24899

THE COURT FINDS:

1. The defendant, represented by counsel, was found guilty on 11/7/01 (Date) of the crimes stated below:

Plea insert "G" for guilty plea; "NC" for nolo contendere, "MI" for guilty but mentally ill • Use "X" if sentence is to be enhanced because of Habitual Offender Act.

Count	CONVICTED BY Plea*	Court*	Jury	CRIME	CHARGE (CODE(S) MCL citation/ PACC Code
1	NC			CSC 2ND DEGREE-RELAT	750.520C1B

☐ 2. The conviction is reportable to the Secretary of State under MCL 257.732 or MCL 281.1040.
The defendant's driver license number is: _____

☐ 3. HIV testing was ordered on 12/10/2001 (Date). Confidential test results are on file.

IT IS ORDERED:

4. Defendant is sentenced to custody of Michigan Department of Corrections. This sentence shall be executed immediately.

Count	SENTENCE DATE	MINIMUM Years	Mos.	Days	MAXIMUM Years	Mos.
1	12/10/01		57		15	

DATE SENTENCE BEGINS	JAIL CREDIT Mos.	Days	OTHER INFORMATION
12/10/01		0	CONSECUTIVE W/00-19193FH2

☐ Defendant shall pay restitution of $ _____. If a cash bond/bail was personally posted by the defendant, payment toward restitution is to first be collected out of that bond/bail and allocated as specified under MCL 775.22.

☒ 5. Sentence(s) to be served consecutively to:
☐ each other. ☐ case numbers 00-19193-FH-2.

6. Defendant shall pay a $60.00 assessment for the Crime Victim Rights Fund.

7. Court recommendation:

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12/11/01 /s/ R. L. Kaczmarek P15639
Date Judge ROBERT L. KACZMAREK Bar no.

Under MCL 769.16a the clerk of the court shall send a copy of this order to the Michigan State Police Central Records Division to create a criminal history record.

I certify that this is a correct and complete abstract from the original court records. The sheriff shall, without needles delay, deliver defendant to the Michigan Department of Corrections at a place designated by the department.

/s/ Linda D. Polzin
(SEAL) Deputy court clerk

STATE OF MICHIGAN
IN THE CIRCUIT COURT OF THE COUNTY OF SAGINAW

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v. **File No. 01-020597-FH-2**
File No. 00-019193-FH-2

ANTONIO HALBERT,

Defendant.
_____/

ORDER OF THE COUPT

At a session of said Court, held at the Court House in the City of Saginaw, County of Saginaw, and State of Michigan, this 18th day of December 2001;

PRESENT: HONORABLE ROBERT L. KACZMAREK, Circuit Judge

This matter comes before the Court on Defendant's Motion to Withdraw Plea.

The Defendant was sentenced on December 10, 2001. The Defendant's Motion to Withdraw Plea is not timely as it was made after sentencing on December 11, 2001. After reviewing the record, there was no agreement as to if the sentences were to run concurrent or consecutive. The Defendant's proper remedy is to appeal to the Michigan Court of Appeals. Accordingly, Defendant's motion is **DENIED**.

It is so ordered.

/s/ Robert L. Kaczmarek
Robert L. Kaczmarek
Circuit Judge
10th Judicial Circuit

Dated: December 18, 2001.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF SAGINAW

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

File No. **00-019193-FH-2**

v

Judge **Robert L. Kaczmarek**

ANTONIO DEWAYNE HALBERT
Defendant.
_____/

ORDER DENYING DEFENDANT'S REQUEST FOR APPOINTMENT OF COUNSEL TO FILE APPLICATION FOR LEAVE TO APPEAL

At a session of said Court, held in the Courthouse in the City and County of Saginaw, State of Michigan, on the 21 day of December, 2001.

PRESENT: HONORABLE **Robert L. Kaczmarek, Circuit Court Judge**

In this cause, defendant has filed a request for a court appointed attorney to assist him in filing an Application for Leave to Appeal to the Court of Appeals following a voluntary plea.

The Court denies appointment of an attorney at public expense for the following reasons:

☑ 1. The defendant does not have a constitutional or statutory right to appointment of appellate counsel to pursue a discretionary appeal. *People v. Bulger*, 462 Mich. 495 (2000), cert. den. 121 SCt. 486.

☑ 2. The defendant fails to set forth any meritorious issue as required by *People v. Najar*, 229 Mich. 393 (1998).

☑ 3. The defendant's plea was not conditional.

☑ 4. The defendant's sentence was in accordance with the plea bargain.

☑ 5. The defendant specifically and voluntarily waived his right to have an attorney appointed at public expense to assist him in filing an application for Leave to Appeal or to assist with other post conviction remedies.

☑ 6. The defendant's sentence was within the sentencing guidelines.

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that defendant's petition for appointment of a court-appointed attorney to assist him in filing for an Application for Leave to Appeal be and the same is denied.

Robert L. Kaczmarek
Robert L. Kaczmarek,
Circuit Court Judge

I certify on this date I mailed a copy of this order denying appointment of counsel to defendant and prosecutor. I also mailed a copy of the defendant's request for appointment of counsel to the prosecutor.

DATE: 12-21-01 Vickie K. Mahan
JNN DENYCNC

NOTICE OF RIGHTS AFTER SENTENCING (AFTER PLEA OF GUILTY/NOLO CONTENDERE) AND REQUEST FOR APPOINTMENT OF ATTORNEY

STATE OF MICHIGAN 10TH JUDICIAL CIRCUIT SAGINAW COUNTY	**CASE NO.** 00-019193-FH-2 **Judge:** R.L. KACZMAREK

Court Address: **111 So. MICHIGAN AVE., SAGINAW, MI 48602**

Court Telephone no.

THE PEOPLE OF THE STATE OF MICHIGAN	**V**	Defendant/Juvenile name, address, and telephone no., and date of birth ANTONIO DEWAYNE HALBERT

NOTICE OF APPEAL RIGHTS Note to Court: This must be given to the defendant/juvenile at sentencing

1. If you wish to appeal your plea or sentence, you may file an application for leave to appeal with the Court of Appeals.

2. If you request the appointment of an attorney and are found indigent, the court **must** appoint an attorney if: a) the prosecuting attorney seeks leave to appeal; or b) your sentence exceeds the upper limit of the minimum sentence range of the application sentencing guidelines; or c) the Court of Appeals or the Supreme Court grants your application for leave to appeal; or d) you seek leave to appeal a conditional plea under MCR 6.301(C)(2)

If you request the appointment of an attorney and are found indigent, the court may appoint an attorney if: a) you seek leave to appeal a sentence based upon an alleged improper scoring of an offensive variable or a prior record variable; and b) you objected to the scoring or otherwise preserved the matter for appeal; and c) the sentence imposed by the court constitutes an upward departure from the upper limit of the minimum sentence range that you allege should have been scored.

3. A request for the appointment of an attorney must be made in writing and sent directly to the court at the address noted above within 42 days. The financial schedule on the back of this form must be completed.

RECEIPT OF NOTICE OF APPEAL RIGHTS AND APPLICATION FOR LEAVE TO APPEAL

On this day I received this form and financial schedule and an application for leave to appeal. I understand that I must return the completed Request for Appointment of Attorney to the court within 42 days if I want an attorney appointed for my appeal.

12 December 2001 — Date

/s/ Antonio D. Halbert — Signature of defendant/juvenile

REQUEST FOR APPOINTMENT OF ATTORNEY AND AFFIDAVIT OF INDIGENCY

I request appointment of an attorney to appeal my conviction. Conditions for my request are on the back of this form. The affidavit of indigency and financial schedule on the back of this form is submitted to show

my financial condition. ☐ I request the court waive the filing fee for my application for leave to appeal.

12 December 2001 — Date

/s/ Antonio D. Halbert — Signature of defendant/ juvenile

NOTE TO DEFENDANT/JUVENILE After completing the request for appointment of attorney and the affidavit of indigency and financial schedule, keep one copy for yourself and return the other copy to the court.

AFFIDAVIT OF INDIGENCY AND FINANCIAL SCHEDULE

I request a court appointed attorney and submit the following information:

1. RESIDENCE ☐ Rent ☐ Own ☐ Live with parents ☐ Room/Board ☒ Prison _____ (Number)	
2. MARITAL STATUS ☐ Single ☐ Married ☐ Divorced ☒ Separated ☐ Dependents: _____ (Number)	
3. INCOME a. **Employer name and address** None	b. **Length of employment** N/A c. **Average of pay** ☐ weekly ☐ monthly ☐ every two weeks Gross: $____ Net $____

d Other income (state monthly amount and source [DSS, VA, rent, pensions, spouse, unemployment, etc.]) If no income, state NONE.	None
4. **ASSETS** State value of car, home, bank deposits, inmate accounts, bonds, stocks, etc. If no assets, state NONE. Attach an account statement and certification for assets in prison accounts.	None
5. **OBLIGATIONS** Itemize monthly rent, installment payments, mortgage payments, child support, etc.	None
6. **REIMBURSEMENT** I understand that I may be ordered to reimburse the court for all or part of my attorney and defense costs.	

7. I pled guilty, guilty but mental ill, or nolo contendere and

   ☐ a. my sentence exceeds the upper limit of minimum sentence range of the applicable sentencing guidelines. Therefore I am entitled to a court appointed attorney if the court finds me indigent.

   ☑ b. I seek leave to appeal a conditional plea made under MCR 6.301(C)(2). Therefore, I am entitled to a court appointed attorney if the court finds me indigent.

☑ c. I believe the offense variable or a prior record variable was improperly scored and I objected to the scoring at sentencing. I state that the sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guideline. As I believe they should have been scored. Therefore, the court may appoint a court appointed attorney if the court finds me indigent.

_____
Signature

/s/ Antonio Dwayne Halbert
Name (type or print)

_____
Address

_____
City, state, zip

Subscribed and sworn to before me on _____(date)
County, Michigan. My commission expires_____
Signature _____

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF SAGINAW

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

File No. **01-020597-FH-2**

v

Judge **Robert L. Kaczmarek**

ANTONIO DEWAYNE HALBERT
Defendant.
_____/

ORDER DENYING DEFENDANT'S REQUEST FOR APPOINTMENT OF COUNSEL TO FILE APPLICATION FOR LEAVE TO APPEAL

At a session of said Court, held in the Courthouse in the City and County of Saginaw, State of Michigan, on the 21st day of December, 2001.

PRESENT: HONORABLE **Robert L. Kaczmarek, Circuit Court Judge**

In this cause, defendant has filed a request for a court appointed attorney to assist him in filing an Application for Leave to Appeal to the Court of Appeals following a voluntary plea.

The Court denies appointment of an attorney at public expense for the following reasons:

☑ 1. The defendant does not have a constitutional or statutory right to appointment of appellate counsel to pursue a discretionary appeal. *People v. Bulger*, 462 Mich. 495 (2000), cert. den. 121 SCt. 486.

☑ 2. The defendant fails to set forth any meritorious issue as required by *People v. Najar*, 223 Mich. 393 (1998).

☑ 3. The defendant's plea was not conditional.

☑ 4. The defendant's sentence was in accordance with the plea bargain.

☑ 5. The defendant specifically and voluntarily waived his right to have an attorney appointed at public expense to assist him in filing an application for Leave to Appeal or to assist with other post conviction remedies.

☑ 6. The defendant's sentence was within the sentencing guidelines.

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that defendant's petition for appointment of a court-appointed attorney to assist him in filing an Application for Leave to Appeal be and the same is denied.

Robert L. Kaczmarek
Robert L. Kaczmarek,
Circuit Court Judge

I certify on this date I mailed a copy of this order denying appointment of counsel to defendant and prosecutor. I also mailed a copy of the defendant's request for appointment of counsel to the prosecutor.

DATE: 12-21-01 Vickie K. Mahan
JNN DENYCNC

NOTICE OF RIGHTS AFTER SENTENCING (AFTER PLEA OF GUILTY/NOLO CONTENDERE) AND REQUEST FOR APPOINTMENT OF ATTORNEY

STATE OF MICHIGAN 10TH JUDICIAL CIRCUIT SAGINAW COUNTY	**CASE NO.** 01-20597-FH-2 **Judge:** R.L. KACZMAREK

Court Address: **111 So. MICHIGAN AVE., SAGINAW, MI 48602** Court Telephone no.

THE PEOPLE OF THE STATE OF MICHIGAN	**V**	Defendant/Juvenile name, address, and telephone no., date of birth ANTONIO DEWAYNE HALBERT

NOTICE OF APPEAL RIGHTS Note to Court: This must be given to the defendant/juvenile at sentencing

1. If you wish to appeal your plea or sentence, you may file an application for leave to appeal with the Court of Appeals

2. If you request the appointment of an attorney and are found indigent, the court **must** appoint an attorney if: a) the prosecuting attorney seeks leave to appeal; or (b) your sentence exceeds the upper limit of the minimum sentence range of the application sentencing guidelines; or c) the Court of Appeals or the Supreme Court grants your application for leave to appeal; or d) you seek leave to appeal a conditional plea under MCR 6.301(C)(2)

If you request the appointment of an attorney and are found indigent, the court may appoint an attorney if: a) you seek leave to appeal a sentence based upon an alleged improper scoring of an offensive variable or a prior record variable; and b) you objected to the scoring or otherwise preserved the matter for appeal; and c) the sentence imposed by the court constitutes an upward departure from the upper limit of the minimum sentence range that you allege should have been scored.

3. A request for the appointment of an attorney must be made in writing and sent directly to the court at the address noted above within 42 days. The financial schedule on the back of this form must be completed.

RECEIPT OF NOTICE OF APPEAL RIGHTS AND APPLICATION FOR LEAVE TO APPEAL

On this day I received this form and financial schedule and an application for leave to appeal. I understand that I must return the completed Request for Appointment of Attorney to the court within 42 days if I want an attorney appointed for my appeal.

12 December 2001 /s/ Antonio D. Halbert
Date Signature of defendant/ juvenile

REQUEST FOR APPOINTMENT OF ATTORNEY AND AFFIDAVIT OF INDIGENCY

I request appointment of an attorney to appeal my conviction. Conditions for my request are on the back of this form. The affidavit of indigency and financial schedule on the back of this form is submitted to show

my financial condition. ☑ I request the court waive the filing fee for my application for leave to appeal.

12 December 2001 /s/ Antonio D. Halbert
Date Signature of defendant/ juvenile

NOTE TO DEFENDANT/JUVENILE After completing the request for appointment of attorney and the affidavit of indigency and financial schedule, keep one copy for yourself and return the other copy to the court.

AFFIDAVIT OF INDIGENCY AND FINANCIAL SCHEDULE

I request a court appointed attorney and submit the following information:

1. RESIDENCE
☐ Rent ☐ Own ☐ Live with parents
☐ Room/Board ☒ Prison _____ (Number)

2. MARITAL STATUS
☐ Single ☐ Married ☐ Divorced ☒ Separated
☐ Dependents: _____ (Number)

3. INCOME

a. **Employer name and address**

None

b. **Length of employment**

N/A

c. **Average of pay**

☐ weekly ☐ monthly
☐ every two weeks

Gross: $____ Net $____

d		Other income (state monthly amount and source [DSS, VA, rent, pensions, spouse, unemployment, etc.]) If no income, state NONE. None
4.	**ASSETS**	State value of car, home, bank deposits, inmate accounts, bonds, stocks, etc. If no assets, state NONE. Attach an account statement and certification for assets in prison accounts. None
5.	**OBLIGATIONS**	Itemize monthly rent, installment payments, mortgage payments, child support, etc. None
6.	**REIMBURSEMENT**	I understand that I may be ordered to reimburse the court for all or part of my attorney and defense costs.

7. I pled guilty, guilty but mental ill, or nolo contendere and

☐ a. my sentence exceeds the upper limit of minimum sentence range of the applicable sentencing guidelines. Therefore I am entitled to a court appointed attorney if the court finds me indigent.

☐ b. I seek leave to appeal a conditional plea made under MCR 6.301(C)(2). Therefore, I am entitled to a court appointed attorney if the court finds me indigent.

☑ c. I believe the offense variable or a prior record variable was improperly scored and I

objected to the scoring at sentencing. I state that the sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guideline. As I believe they should have been scored. Therefore, the court may appoint a court appointed attorney if the court finds me indigent.

/s/ Antonio D. Halbert
Signature

Antonio Dwayne Halbert
Name (type or print)

Jackson Prison
Address

Jackson, Mich.
City, state, zip

Subscribed and sworn to before me on _____(date)
County, Michigan. My commission expires_____
Signature _____

Honorable Robert L. Kaczmarek
Saginaw County Circuit Court Judge
111 S. Michigan Ave.
Saginaw, MI 48602

September 6, 2002

RE: *People* v *Antonio D. Halbert*
Case No's: 00-19193-FH & 01-20597-FH-2

Dear Judge Kaczmarek:

I am the above named defendant. I previously attempted to have a lawyer appointed for post-conviction and the request was denied.

Please find herein enclosed a Defendant's Motion for Appointment of Counsel with an included Motion for Evidentiary Hearing/Resentencing.

I present to the court that I may be entitled to appointment of counsel to assist me due to my meeting the criteria of seeking an appeal for misscored guidelines and the sentence imposed by the court would be in excess of properly scored guidelines.

Although I have not had this issue preserved at sentencing, I am seeking to have the issue addressed by the court prior to seeking relief in the Court of Appeals if relief is denied in the trial court.

Please review the enclosed motion and advise me of the Court's decision on my requests as soon as possible so that I may have at least some time of the 12 month period for filing an Application for Leave to Appeal directly to the Michigan Court of Appeals.

In considering my request, please take into account the findings of the US District Court wherein it was stated

that the Public Act Codifying the practice of denying appointed counsel to indigents seeking leave to appeal their plea based felony convictions is unconstitutional and Declaratory relief was ordered, *Tesmer* v *Granhoim,* 114 F.Supp2d 603 (2000).

It would be greatly appreciated if Your Honor would at this time appoint counsel to assist me in my efforts to have my sentencing guidelines corrected and resentenced or to seek leave to appeal.

Respectfully submitted,

/s/ Antonio D Halbert #382400
Antonio D. Halbert, #382400
Defendant in pro per
Muskegon Correctional Facility
2400 S. Sheridan Rd.
Muskegon, MI 49442-6298

cc: Michael D. Thomas
file

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR
THE COUNTY OF SAGINAW

PEOPLE OF THE STATE
OF MICHIGAN

Plaintiff,

v.

File Nos. 00-019193-FH-2
01-020597-FH-2

ANTONIO HALBERT,

Defendant. /

DEFENDANT'S MOTION FOR APPOINTMENT OF COUNSEL AND REMAND FOR EVIDENTIARY HEARING/RESENTENCING

NOW COMES Defendant, ANTONIO HALBERT, in pro per, and pursuant to MCR 6.429(C) petitions this Court to APPOINT COUNSEL to assist Defendant preserve issues concerning the Presentence Report and Scoring of the Sentencing Guidelines by filing a Motion for an Evidentiary Hearing on Ineffective Assistance of Counsel and/or Motion for Resentencing, and in support hereof states as follows:

1. On November 7, 2001, Defendant pled NO CONTEST on two counts of CSC II arising from two separate transactions as part of a plea agreement which required the prosecutor to dismiss a second and third count of CSC in one of the cases.

2. On December 10, 2001, Defendant appeared in this Court for sentencing at which time consecutive sentences of 24 months to 15 years and 57 months to 15 years (81 months to 30 years) were imposed.

3. On or about December 11, 2001, Defendant filed a handwritten motion to withdraw pleas. Said motion had been prepared by another prisoner without benefit of the trial record and was inaccurate in content and form.

4. On December 21, 2001, this Court issued an Order DENYING appointment of counsel at public expense.

5. On March 18, 2002, this Court issued an order to the clerk to prepare copies of the records and files in the cases and provide them to the Defendant.

6. Defendant, who, according to the record, required special education due to learning disabilities, eventually obtained assistance from a different prisoner who reviewed the documents provided by the clerk in response to the Court's March 18, 2002 Order.

7. It appears that review of the record establishes that Defendant's trial counsel, ROD O'FARRELL (P23539), although retained, was so preoccupied with other matters, e.g. *United States v. Francis Darrell Hayden,* Case No. 99-CR-20011-BC; *People v. Timothy Burch,* Case No. 01-19568-FC, that the time and attention extended to this Defendant's case was so nominal as to be easily seen as ineffective. Attached as Defendant's Exhibits 1, 2, 3, and 4 are copies of four Motions to Adjourn trial counsel filed due to his dedication to other cases he was more interested in litigating.

8. Also attached as Defendant's Exhibits 5 and 6 are copies of the two separate SENTENCING INFORMATION REPORTS with written analysis of errors in the scoring which trial counsel failed to detect and challenge although proper evaluation prior to sentencing would have exposed the errors and resulted in significantly lesser sentences.

9. The Sentencing Information Reports now at issue appear to have been prepared by DEBRA KAY HALL, who, while possibly experienced as a bureaucratic paper pusher, IS NOT AN ATTORNEY and was motivated by subjective personal passions to color Defendant in the most absolutely worst light possible and misapplied various criteria in the scoring of the sentencing guidelines in manners which render the sentences unlawful.

10. Trial counsel's preoccupation with other matters made him inattentive to his responsibilities to Defendant and left Defendant, a mentally impaired person, essentially without representation during plea negotiations and sentencing.

11. In order to obtain re ef or alternatively to preserve these issues for appeal, Defendant is required to present the issues to this court for consideration, MCR 6.429(C).

13. Due to only having recently obtained the records and careful review, Defendant has not been able to present these challenges at an earlier time.

14. The time for filing an Application for Leave to Appeal has not expired and this Court has the authority to exercise jurisdiction and APPOINT COUNSEL to assist Defendant to develop and present the issues to the trial court and if necessary to file an Application for Leave to Appeal.

RELIEF

WHEREFORE, Defendant humbly prays this Honorable Court will GRANT his request and APPOINT COUNSEL to assist him seek post-conviction relief of

INEFFECTIVE ASSISTANCE of TRIAL COUNSEL and resulting Sentencing errors, or alternatively, REMAND this case for Resentencing under properly scored guidelines with all original parties participating.

Respectfully submitted,

/s/ Antonio D. Halbert, #382400
Antonio D. Halbert, #382400
Defendant in pro per
Muskegon Correctional Facility
2400 S. Sheridan Rd.
Muskegon, MI 49442-6298

Dated: Sept. ,2002.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF SAGINAW

PEOPLE OF THE STATE
OF MICHIGAN

Plaintiff

vs.

ANTONIO D. HALBERT,

Defendant. /

File Nos. 00-019193-FH-2
01-020597-FH-2

ORDER OF THE COURT

At a session of said Court, held in the Courthouse in the City and County of Saginaw, State of Michigan, on the 25th day of October, 2002.

PRESENT: HONORABLE ROBERT L. KACZMAREK, CIRCUIT JUDGE.

This matter comes before the Court for the Appointment of Counsel. In the instant case, an Order was issued by the Court denying the Defendant's Motion for Appellate Counsel. Having reviewed the case and current case law, the defendant does not have a constitutional or statutory right to appointment of appellate counsel to pursue a discretionary appeal. *People v. Bulger,* 462 Mich 495 (2000), *cert den* 121 S.Ct. 486.

THEREFORE, IT IS HEREBY ORDERED that defendant's Motion for Appointment of Counsel is **DENIED**.

It is so ordered.

/s/ RL Kazmarek
ROBERT L. KACZMAREK
Circuit Judge
10th Judicial Circuit

Date: October 25 2002.

APPLICATION FOR LEAVE TO APPEAL AFTER SENTENCING ON PLEA OF GUILTY OR NOLO CONTENDERE

STATE OF MICHIGAN COURT OF APPEALS		10th CIRCUIT COURT **SAGINAW** COUNTY **CASE NO.** 00-19193/ 01-20597-FH
THE PEOPLE OF THE STATE OF MICHIGAN	**V**	Defendant's name, address, and inmate no **Antonio Dwayne Halbert, #382400 Muskegon Correctional Facility 2400 S. Sheridan Rd Muskegon, MI 49442-6298**

Using the information from your judgment of sentence form, enter the number of the circuit court, the county, and the case number in the upper right-hand corner. Follow the instructions for each of the items. Print or type all information.

STATEMENT OF DELAY

1. This application is being filed more than 21 days after entry of the judgment of sentence because:

   ☒ I did not know until recently that I could appeal the decision.

   ☐ I could not afford the postage and copying costs to file this application.

   ☒ I did not know until recently how to appeal the decision.

   ☒ I needed to get help to complete this application.

   ☒ Other: I was awaiting a decision on a motion filed in the trial court. (Explain)

APPLICATION

2. I was found guilty on 11-7-01 (Date) of the crime(s) as stated below:

Count	PLEA G	PLEA NC	CRIME	CHARGE CODE(S) MCL citation/ PACC Code
1		XX	2nd Degree CSC-U/13	750.520C1A
1		XX	CSC 2nd Degree-Relat	750.520C1B

*Plea: Check "G" for guilty plea; check "NC" for nolo contendere

3. I was sentenced as stated below by Judge ROBERT L. KACZMAREK (Name of Judge)

Count	SENTENCE DATE	MINIMUM Years	MINIMUM Mos.	MINIMUM Days	MAXIMUM Years	MAXIMUM Mos.
1	12-10-01		24		15	
1	12-10-01		57		15	

DATE SENTENCE BEGINS	JAIL CREDIT Mos.	JAIL CREDIT Days	OTHER INFORMATION
12-10-01		164	PRIOR TO 01-20597-FH-2
12-10-01		0	CONSECUTIVE TO 00-19193-FH-2

4. ☒ I filed with the trial court a request for appointment of an attorney and affidavit of indigency on 12-18-01/9-6-02 (Date)

5. STATEMENT OF QUESTIONS INVOLVED

State the issues that you want the Court of Appeals to review, such as how you believe the circuit court erred in accepting your plea or imposing the sentence. If you need more space, attach additional pages.

Defendant-Appellant is requesting the Court of Appeals to review the trial court record for a claim of ineffective assistance of counsel which resulted in Defendant-Appellant receiving sentences which were calculated on erroneously scored sentencing guidelines and much harsher sentences than what should have been considered and/or imposed under the facts and circumstances in this case.

Defendant-Appellant would also ask this court to consider if the sentencing court has a duty to ensure that trial counsel and the prosecutor evaluate the scoring of the sentencing guidelines in order to ensure that where the guidelines have been prepared by a person without legal training, the guidelines have been properly scored.

Finally, trial counsel failed to ensure that Defendant-Appellant understood things properly

6. STATEMENT OF FACTS

Give any facts not stated in items 2, 3, and 4 on page 1 that are relevant to this appeal. You must also state the transcript pages or other parts of the record that support your facts. If you need more space, attach additional pages.

Although Defendant-Appellant was represented by retained counsel, the record will show that counsel was so involved in other cases for other clients that the representation afforded this Defendant-Appellant was perfunctory and superficial. Due to trial counsel's preoccupation with other clients' cases, trial counsel failed to evaluate the sentencing guidelines and allowed improper and unlawful procedures to be employed in dealing with the cases and sentences imposed on Defendant-Appellant. Attached Appendix "G" is a copy of Defendant-Appellant's "Motion for Appointment of Counsel and Remand for Evidentiary Hearing/Resentencing" which has been sent to the trial court but for which no acknowledgment has been provided. This pleading, more fully explains these issues. This application is being submitted to avoid expiration of time limits.

7. ARGUMENTS

For each issue listed in item 5. on page 2, state the law that supports your position and explain how the law applies to the facts of your case. If you need more space, attach additional pages.

Cuyler v. *Sullivan*, 446 US 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); *Perillo* v. *Johnson*, 79 F.3d 441 (5th Cir 1996); *US* v. *Ellison*, 798 F.2d 1102 (7th Cir 1986); *Blanco* v. *Singletary*, 943 F.2d 1477 (11th Cir 1991), The foregoing cases relate to trial counsel being ineffective because of having other interests which prevented effective advocacy for Defendant-Appellant. *Lopez* v. *Scully*, 58 F.3d 38 (2nd Cir 1995); *Smith* v. *Stewart* 140 F.3d 1263 (9th Cir 1998); *Riascos-Prado* v. *US*, 66 F.3d 30 (2nd Cir 1995), These cases relate to trial counsel's failure to ensure

that Defendant-Appellant was treated fairly and lawfully in relation to sentencing. *Townsend* v. *Burke*, 334 US 736, 68 S.Ct. 1252 92 L. Ed 1690 (1948); *US* v. *Lewis*, 68 F.3d 987 (6th Cir 1995); *US* v. *Tabares*, 86 F.3d 326 (3rd Cir 1996); *US* v. *Takai*, 941 F.2d 738 (9th Cir 1991); *Correll* v. *Stewart*, 137 F.3d 1404 (9th Cir. 1998), these cases involve the scoring of the sentencing guidelines, inaccurate information used in determining the sentence to be imposed, and the defendant's mental condition.

In addition to the federal caselaws cited above, Defendant-Appellant would request the Court to consider the following relevant state court caselaw:

People v. *Najar*, 229 Mich App 393 (1998); *People* v. *Love*, 144 Mich App 374 (1985); *People* v. *Jackson*, 95 Mich App 565 (1980); *People* v. *Hernandez*, 443 Mich 1, (1993); *People* v. *Dowdy*, 148 Mich 517 (1986); And the following federal and state constitutional rights, U.S. Const. Amends IVX [sic], V, and VI: Mich Const. 1963, Art I, Secs. 17, 20.

As Defendant-Appellant requests appellate review of the performance of his trial counsel for ineffectiveness resulting in serious abuses and procedural errors that deprived him of proper sentencing on each conviction in a fair and lawful manner, and the mental state of Defendant-Appellant was established as having been deficient, the trial court record requires development for preservation.

The trial court has previously denied appointment of counsel for appeal and where the case now requires inquiry into the scoring of the sentencing guidelines and the performance of

trial counsel in regards to ensuring Defendant was treated fairly during the sentencing phases of his separate convictions.

Defendant-Appellant also requests this Court to consider that this application for leave to appeal involves consecutive sentences which were computed in tandem and as one at the same time. Thus the sentences should be reviewed for proportionality as set forth in *People* v. *Kent*, 194 Mich App 206 (1992); *People* v. *Warner*, 190 Mich App 734 (1991).

8. RELIEF REQUESTED

State what you want the Court of Appeals to do.

I pray the Court REMAND this case to the trial court for consideration of the issues presented in his Motion for Appointment of Counsel and Remand for Evidentiary Hearing/Resentencing, or alternatively, that the Court REMAND the Case for resentencing under proper procedures as the facts of this case requires.

_____ /s/ Antonio D. Halbert
Date Signature

PROOF OF SERVICE

I certify on this date a copy of this application and appropriate attachments were served on the prosecutor of _____ County by ☐ personal service. ☐ mail.

_____ _____
Date Signature

Court of Appeals, State of Michigan

ORDER

PEOPLE v ANTONIO DWAYNE HALBERT		HILDA R. GAGE Presiding Judge
Docket No.	244756	E. THOMAS FITZGERALD
LC No.	00-19193-FH-2; 01-020597-FH-2	HENRY WILLIAM SAAD Judges

The Court orders that the defendant-appellant's delayed application for leave to appeal is DENIED for lack of merit in the grounds presented.

/s/ Hilda R. Gage
HILDA R. GAGE
Presiding Judge

[SEAL] A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JAN 13 2003 /s/ Sandra Schultz Mengel
Date Chief Clerk

COVER LETTER

February 21, 2003
(Put Today's Date)

Clerk
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: People v. Antonio Halbert	(The name you were convicted under goes here.)
Supreme Court No. _____	(Leave blank – the Clerk will assign a number for you.)
Court of Appeals No. 244756	(Get this number from the Court of Appeals decision.)
Trial Court No. 01-20597/00-19193-FH	(Get this number from Court of Appeals brief or Presentence Investigation Report.)

Dear Clerk:

Enclosed please find the original of the pleadings checked below. (Put a check mark by the items you are sending.) I am indigent and can not provide seven copies. Please file them.

_X_ Affidavit of Indigency/Proof of Service

_X_ (Delayed) Pro Per Application for Leave to Appeal

_X_ Court of Appeals Decision (You must enclose a copy of the Court of Appeals decision.)

_X_ Court of Appeals Brief (This is not necessary, but it is a good idea.)

___ Supplemental Court of Appeals Brief (This is not necessary, but it is a good idea.)

X Other TRIAL COURT MOTION FOR APPOINTMENT OF COUNSEL AND REMAND FOR EVIDENTIARY HEARING/RESENTENCING/ORDER DENYING SAME

Thank you.

Sincerely,

/s/ Antonio D. Halbert
(Sign here)

Antonio D. Halbert
(Print Name)

382400
(Prisoner Number)

2400 S. Sheridan Rd
(Address)

Muskegon, MI 49442-6298
(City, State, Zip Code)

Copy sent to:
Saginaw County Prosecutor

IN THE SUPREME COURT FOR THE STATE OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN,	Supreme Court No. _____ (Leave blank.)
Plaintiff-Appellee,	Court of Appeals No. 244756 (Get this from the court of Appeals decision or brief.)
v	
Antonio D. Halbert (Print the name you were convicted under on this line.)	Trial Court. No. 01-20597/00-19193-FH (Get this number from Court of Appeals brief or Presentence investigation Report.)
Defendant-Appellant.	

(DELAYED) PRO PER APPLICATION FOR LEAVE TO APPEAL

INSTRUCTIONS: Answer each question. Add more pages if you need more space. You MUST send a copy of the Court of Appeals decision. Your application must be RECEIVED by the Supreme Court no more than 56 days from the date stamped on the Court of Appeals decision.

1. I was found guilty on (date of plea or verdict) November 7, 2001.

2. I was convicted of (name of offense(s)) 2nd Degree CSC – U/13 and CSC 2nd Degree – RELAT

3. I had a XX guilty plea; ___ no contest plea; ___ jury trial; ___ trial by judge. (Mark one)

4. I was sentenced by Judge Robert L. Kaczmarek (name of judge) on December 10, 2001 (date you were

sentenced) in the Saginaw (name of county where you were sentenced; for crimes in Detroit, put Recorder's Court) County Circuit Court to 2 years ___ months (minimum sentence) to 15 years ___ months (maximum sentence), and 4 years 9 months (minimum sentence) to 15 years ___ months (maximum sentence). I am in prison at the Muskegon Correctional Facility (name of prison) in Muskegon (city), Michigan.

5. The Court Appeals affirmed my conviction on January 13, 2003 (date stamped on Court of Appeals decision), in case number 244756 (number on Court of Appeals decision). A copy of that decision is attached.

6. ____ This application is filed on time. (Check here if the Court will receive it within **21 days** from the Court of Appeals decision.)

XX This application is filed late. (Check here if the Court will receive it more than 21 days but within **56 days** from the Court of Appeals decision.) It is late because: (Check all the reasons that apply. You can add others.)

XX I had to find help

I could not get postage and supplies to file this application.

XX I am not experienced or educated in the law.

____ I did not receive my decision from my attorney in time.

XX Other. Explain It took time to obtain legal books.

GROUNDS – ISSUES RAISED IN COURT OF APPEALS

7. I want the Court to consider the issues as raised in my Court of Appeals brief and the additional information below.

INSTRUCTIONS: In the part below, only bring up issues that were in your Court of Appeals brief. Attach a copy of your Court of Appeals brief if possible. If you prepared a supplemental brief which was filed in the Court of Appeals, those issues go in this part also. You should attach a copy of that brief, too, if you can. New issues go in question 8 which starts on page 7.

ISSUE I:

A. (Copy the headnote, the title of the issue, from your Court of Appeals brief.)

Defendant-Appellant was denied effective assistance of counsel at sentencing resulting in a sentence which was based upon improperly scored sentencing guidelines and a combined consecutive sentence which exceeded appropriate scores.

B. The Court should review the Court of Appeals decision on this issue because: (Check all the ones you think apply to this issue, but you must check at least one.)

X 1. The issue raises a serious question about the legality of a law passed by the legislature.

X 2. The issue raises a legal principle which is very important to Michigan law.

X 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.

X 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think the choices you checked in B apply to this issue. List any cases that you want the Supreme Court to consider. State any facts which you want the Court to consider. If you think the Court of Appeals mixed up any facts about this issue, explain here. If you need more space, you can add more pages.)

The new Michigan Sentencing Guidelines have the force of law and DUE TO MY TRIAL ATTORNEY BEING PREOCCUPIED WITH OTHER CASES THAT WERE MORE IMPORTANT TO HIM AS REFLECTED IN HIS MOTIONS AND LETTERS (included as exhibits to attachments), he failed to conduct adequate review and investigation into the scoring of the guidelines and allowed the scoring of two separate convictions on two separate cases to be scored in a manner that was unlawful and unconstitutional. If my guidelines had been properly scored as required by law, I would have less than half the prison time I was ordered to serve. Please see ***People*** **v.** ***Harmon*****, 248 MA 522 (2001);** ***Strickland*** **v.** ***Washington*****, 466 US 668 (1984);** ***Glover*** **v** ***US*****, 531 US 198 (2001), MCL 769.34(2), (10).**

ISSUE II:

A. (Copy the headnote, the title of the issue, from your Court of Appeals brief.)

The trial court should ensure that the sentencing guidelines are evaluated for correctness so that the appropriate minimum sentencing range is applied.

B. The Court should review the Court of Appeals decision on this issue because: (Check all the ones you think apply to this issue, but you must check at least one.)

___ 1. The issue raises a serious question about the legality of a law passed by the legislature.

X 2. The issue raises a legal principle which is very important to Michigan law.

X 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.

___ 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think the choices you checked in B apply to this issue. List any cases that you want the Supreme Court to consider. State any facts which you want the Court to consider. If you think the Court of Appeals mixed up any facts about this issue, explain here. If you need more space, you can add more pages.)

The Michigan Legislature and Courts have enacted and implemented laws to determine the appropriate sentence for certain offenses are tailored to not only the offense but to the offender as well. However, in my case, the sentencing guidelines were prepared by a person who abandoned the role of a fair and impartial clerk and did further simply calculate the guidelines in a clearly erroneous manner. Specifically, the first conviction was scored as though the second conviction PRECEEDED it and the same was done in reverse for the second

conviction. Since the court failed to ensure that the guidelines were appropriately scored, I am entitled to appellate review, ***Harmon***, supra. **MCL 769.34(10); *Glover***, supra.

NEW ISSUE I:

A. (State the new issue you want the court to consider.)

Under the circumstances of my case and the issues being raised, I am entitled to appointment of counsel to assist me in seeking appellate review of the sentences since I am seeking to challenge the scoring of the sentencing guidelines and question the effectiveness of trial counsel.

B. The Court should review this issue because: (Check all the ones you think apply to your case, but you must check at least one.)

___ 1. The issue raises a serious question about the legality of a law passed by the legislature.

_X_ 2. The issue raises a legal principle which is very important to Michigan law.

_X_ 3. The Court of Appeals decision is clearly wrong and will cause an important injustice to me.

___ 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think tht your choices in B above apply to this issue in your case. List any cases and citations, laws, or court rules, etc. which support your argument. Explain how they apply to this issue. State the facts which support and explain this issue. If these facts

were not presented in court, explain why. You can add more pages.)

Although I entered a guilty plea and there was no sentencing agreement(s), I am still entitled to appeal the scoring of the sentencing guidelines. Especially where as here, I did not have effective assistance of counsel in relation to sentencing. My trial counsel did nothing more than go through the motions in a perfunctory manner. The trial court refused to appoint counsel to assist me appeal the scoring of the sentencing guidelines, this is erroneous under ***People* v *Najar*, 229 MA 393 (1998); *People* v *Bulger*, 462 Mich 495, 505 (2000); *Tesmer* v *Granholm*, 295 F.3d 536 (6th Cir 2002); MCL 769.34(10).**

RELIEF REQUESTED

9. For the above reasons I request that this Court *GRANT* leave to appeal, *APPOINT* a lawyer to represent me, and *GRANT* any other relief it decides I am entitled to receive.

February 21, 2003	/s/ Antonio D. Halbert
(Date)	(Sign Name)
Antonio D. Halbert	382400
(Print Name)	(Prison Number)
2400 S. Sheridan Rd	Muskegon, MI 49442-6298
(Address)	(City, State, Zip Code)

IN THE SUPREME COURT FOR THE STATE OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN,	Supreme Court No. _____ (Leave blank.)
Plaintiff-Appellee,	Court of Appeals No. 244756 (Get this from the court of Appeals decision or brief.)
v	
Antonio D. Halbert (Print the name you were convicted under on this line.)	Trial Court. No. 01-20597/00-19193-FH (Get this number from Court of Appeals brief or Presentence investigation Report.)
Defendant-Appellant.	

AFFIDAVIT OF INDIGENCY

1. My name is Antonio D. Halbert
2. I am in prison at Muskegon Correctional Fac. (Name of prison) in Muskegon (City), Michigan.
3. My prison number is 382400;
4. Income and Assets: (Check the ones which apply to you.)

X My only source of income is from my prison job.

___ I have no income.

X I have no assets (stocks, bonds, property) which can be quickly changed into cash.

X I can not pay the filing fee for the attached application.

I ask this Court to waive the filing fee in this matter.

I declare that the statements above are true to the best of my knowledge, information and belief.

Date: February 21, 2003 /s/ Antonio D. Halbert
(Sign here)

Antonio D. Halbert
(Print name)

PROOF OF SERVICE

On February 21, 2003, I mailed by U.S. mail one copy of the documents checked below: (Put a check mark by the ones you mailed.)

X Affidavit of Indigency and Proof of Service.

X (Delayed) Pro Per Application for Leave to appeal with a copy of Court of Appeals Decision.

X Court of Appeals Brief

___ Supplemental Court of Appeals Brief

- TO: Saginaw (Fill in the county where you were convicted.) County Prosecutor, at 111 South Michigan Ave (Address), Saginaw (City), MI 48602 (Zip Code)

I declare that the statements above are true to the best of my knowledge, information and belief.

Date: February 21, 2003 /s/ Antonio D. Halbert
(Sign here)

Antonio D. Halbert
(Print name)

Order Michigan Supreme Court
Lansing, Michigan

Entered: September 19, 2003 Maura D. Corrigan,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

123342

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

ANTONIO DWAYNE HALBERT,
Defendant-Appellant.

SC: 123342
COA: 244756
Saginaw CC:
00-19193-FH-2;
01-020597-FH-2

/

On order of the Court, the application for leave to appeal the January 13, 2003 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Cavanagh, J., states as follows:

I would remand to the Court of Appeals for reconsideration of the defendant's application for leave to appeal. I would further direct the Court of Appeals, before reconsidering the application, to remand the case to the Saginaw Circuit Court for appointment of counsel. Counsel then could, within a reasonable time limit set by the Court of Appeals, file a supplement which the Court of Appeals

would consider as though it were a part of the defendant's initial application.

Kelly, J., joins in the statement of Cavanagh, J.

s0916

[SEAL] I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 19, 2003 /s/ Corbin R. Davis

(4)

No. 03-10198

Supreme Court, U.S.
FILED
JAN 21 2005
OFFICE OF THE CLERK

In The Supreme Court of the United States

ANTONIO DWAYNE HALBERT,

Petitioner,

v.

MICHIGAN,

Respondent.

On Writ Of Certiorari To The Michigan Court Of Appeals

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QUESTIONS PRESENTED

1. Does the Fourteenth Amendment guarantee the assistance of counsel to an indigent criminal defendant for a first-tier direct application for leave to appeal to an intermediate appellate court from a plea-based felony conviction and sentence, where the appellate court grants or denies such applications on the merits?

2. Is Petitioner entitled to a new direct appeal with the assistance of appellate counsel so that he may develop the record necessary to support his appellate claims, including ineffective assistance of trial counsel?

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ORDERS BELOW

The December 21, 2001, and October 25, 2002, orders of the Saginaw County Circuit Court denying Petitioner's requests for appellate counsel are unreported. J.A. 44-45, 51-52, 64-65.

The Michigan Court of Appeals' January 13, 2003, order denying Petitioner's application for leave to appeal "for lack of merit in the grounds presented" is unreported. J.A. 72.

The Michigan Supreme Court's September 19, 2003, order denying Petitioner's application for leave to appeal is reported as *People v. Halbert*, 669 N.W.2d 814 (Mich. 2003). J.A. 84-85.

JURISDICTION

The Michigan Supreme Court's order denying Petitioner's application for leave to appeal was entered on September 19, 2003. The petition for writ of certiorari was filed within 90 days of that date, on November 20, 2003. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

> citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Michigan Constitution 1963, art. I, § 20, provides:

> In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than 12 jurors in prosecutions for misdemeanors punishable by imprisonment for not more than 1 year; to be informed of the nature of the accusation; to be confronted with the witnesses against him or her; to have compulsory process for obtaining witnesses in his or her favor; to have the assistance of counsel for his or her defense; to have an appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court; and as provided by law, when the trial court so orders, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal.

The statute under challenge in this case, Mich. Comp. Laws § 770.3a, provides:

> (1) Except as provided in subsections (2) and (3), a defendant who pleads guilty, guilty but mentally ill, or nolo contendere shall not have appellate counsel appointed for review of the defendant's conviction or sentence.

> (2) The trial court shall appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if any of the following apply:
>
> (a) The prosecuting attorney seeks leave to appeal.
>
> (b) The defendant's sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines.
>
> (c) The court of appeals or the supreme court grants the defendant's application for leave to appeal.
>
> (d) The defendant seeks leave to appeal a conditional plea under Michigan Court Rule 6.301(C)(2) or its successor rule.
>
> (3) The trial court may appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if all of the following apply:
>
> (a) The defendant seeks leave to appeal a sentence based upon an alleged improper scoring of an offense variable or a prior record variable.
>
> (b) The defendant objected to the scoring or otherwise preserved the matter for appeal.
>
> (c) The sentence imposed by the court constitutes an upward departure from the upper limit of the minimum sentence range that the defendant alleges should have been scored.

(4) While establishing that a plea of guilty, guilty but mentally ill, or nolo contendere was made understandingly and voluntarily under Michigan Court Rule 6.302 or its successor rule, and before accepting the plea, the court shall advise the defendant that, except as otherwise provided in this section, if the plea is accepted by the court, the defendant waives the right to have an attorney appointed at public expense to assist in filing an application for leave to appeal or to assist with other postconviction remedies, and shall determine whether the defendant understands the waiver. Upon sentencing, the court shall furnish the defendant with a form developed by the state court administrative office that is nontechnical and easily understood and that the defendant may complete and file as an application for leave to appeal.

STATEMENT OF THE CASE

Appeals from Plea-Based Felony Convictions in Michigan

Before 1994, every person convicted of a felony in Michigan had the right to an automatic appeal with full briefing and oral argument to the Michigan Court of Appeals. In 1994, however, Article 1, § 20 of the Michigan Constitution was amended to provide that, "In every criminal prosecution, the accused shall have the right . . . to have an appeal as a matter of right, *except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court.*" (Amended language emphasized). The purpose of this amendment was to reduce the workload of the Michigan Court of

Appeals by streamlining the appellate process for appeals from plea-based felony convictions. *See People v. Bulger*, 614 N.W.2d 103, 106-07 (Mich. 2000) (discussing history of 1994 amendment).

Since 1994, therefore, criminal defendants who pleaded guilty or nolo contendere to felonies in Michigan and who believed that error occurred at sentencing or at some other point in the proceedings have filed applications for leave to appeal to the Michigan Court of Appeals. If such an application is granted, the appeal proceeds to full briefing and argument. Mich. Ct. R. 7.205(D)(3). If, on the other hand, the Michigan Court of Appeals denies the application, it does so by issuing a standard order that "uniformly state[s] that leave is denied 'for lack of merit in the grounds presented.'" *Bulger,* 614 N.W.2d at 124 (Cavanagh, J., dissenting); *accord*, J.A. 72 (order denying Petitioner's application).

The Michigan Court of Appeals treats its orders denying leave to appeal "for lack of merit in the grounds presented" as decisions on the merits with preclusive effect under the law of the case doctrine. *See, e.g., People v. Hayden*, 348 N.W.2d 672, 684 (Mich. Ct. App. 1984) (holding order denying application "for lack of merit in the grounds presented" was decision on merits barring relitigation); *Contineri v. Clark*, No. 237739, 2003 WL 21771236, at *2 (Mich. Ct. App. Jul. 31, 2003) (holding law of the case barred relitigation of issues raised in previous application denied "for lack of merit in the grounds presented" because order "did, in fact, express an opinion on the merits"). *See also Abela v. Martin*, 380 F.3d 915, 923 (6th Cir. 2004) (holding that Michigan Court of Appeals' decision denying leave to appeal "for lack of merit in the grounds presented" is a "merits determination" for habeas corpus purposes);

People v. Walker, 653 N.W.2d 621, 622, 623 n.5 (Mich. 2002) (Corrigan, C.J.) (noting that order denying application "for lack of merit in the grounds presented" demonstrates "[t]he Court of Appeals reviewed the substantive arguments advanced in the application and concluded that they lacked merit" and that "the Court of Appeals plainly considered the merits of defendant's arguments").

More than ninety percent of felony convictions in Michigan are obtained by plea. *See* Michigan Supreme Court 2003 Annual Report, Circuit Court Statistical Supplement at 3 (showing that of 52,913 felony criminal cases disposed of by verdict or by plea in 2003, 49,833 (94.1%) were disposed of by guilty plea). The great majority of those nearly 50,000 defendants who enter pleas do not appeal. *Compare id. with* Michigan Supreme Court 2003 Annual Report at 18 (observing that there were 7445 appeals of all types filed in the Michigan Court of Appeals in 2003). Those who do appeal most commonly do so in order to raise sentencing issues. *See* Mara Matuszak, Note, *Limiting Michigan's Guilty and Nolo Contendere Plea Appeals*, 73 U. Det. Mercy L. Rev. 431, 438 (1996) (discussing Michigan State Bar Report finding "a significant majority of guilty plea appeals involve only sentencing issues").

Michigan's Denial of Counsel to Indigent Appellants

Since the 1994 amendment to the state constitution did not, by its terms, eliminate the right to counsel for first appeals, the vast majority of Michigan trial judges continued to routinely appoint counsel to indigent plea defendants who requested the assistance of appellate counsel. However, a few trial judges began to routinely deny

appellate counsel to such indigents. *See Kowalski v. Tesmer*, ___ U.S. ___, 125 S.Ct. 564, 566 (2004). In 2000, a divided Michigan Supreme Court upheld that practice, concluding that indigent plea defendants have no constitutional right to appellate counsel. *Bulger*, 614 N.W.2d at 110-15.

While the *Bulger* case was still pending in the Michigan Supreme Court, the Michigan Legislature enacted Mich. Comp. Laws § 770.3a (2000) ("the statute"), which provides that Michigan judges "shall not" appoint appellate counsel to assist indigent defendants who wish to file an application for leave to appeal from a plea-based conviction or sentence unless the indigent received an upward departure from the sentencing guidelines or was permitted to enter a conditional plea. The statute provides that a trial judge "may" appoint appellate counsel for an indigent defendant if he or she has preserved an outcome-determinative challenge to the judge's scoring of the sentencing guidelines. The statute forbids a trial judge from appointing counsel if the indigent wishes to raise any other type of issue on appeal.

Before the statute took effect in 2000, a group of indigent criminal defendants and appellate attorneys filed a lawsuit in federal district court seeking, *inter alia*, a declaratory judgment that the statute is unconstitutional. *See Kowalski*, 125 S.Ct. at 566. Both the district court and the *en banc* Sixth Circuit declared the statute unconstitutional. *Id.* at 566-67. This Court reversed that judgment without reaching the merits, concluding that the plaintiff attorneys lacked standing and that the lower courts had properly abstained from deciding the claims of the indigent criminal defendants. *Id.* at 567-70.

During the pendency of the *Tesmer* litigation, most Michigan trial judges continued to appoint appellate counsel for indigents who wished to file applications for leave to appeal from plea-based convictions and sentences. However, while *Tesmer* was pending in this Court, the Michigan Supreme Court issued an order declaring the statute constitutional and directing Michigan trial judges to deny counsel to indigent plea defendants notwithstanding the contrary federal court opinions and that the issue was pending in this Court. *People v. Harris*, 681 N.W.2d 653 (Mich. 2004).

Petitioner Halbert's Case

Petitioner Antonio Dwayne Halbert pleaded nolo contendere to two counts of second-degree criminal sexual conduct on November 7, 2001, in the Saginaw County Circuit Court. J.A. 23. In exchange for his plea, the prosecutor agreed to dismiss two additional counts. J.A. 18. The trial judge announced that he had found the factual basis for the first count by "review[ing] the preliminary examination." J.A. 23. In fact, the docket entries reveal that Mr. Halbert had waived the preliminary examination for both counts. J.A. 1, 4.

In the course of taking the plea, the trial judge informed Petitioner that he was waiving various rights by entering a plea. J.A. 19-22. The judge then advised Petitioner that he would appoint appellate counsel to assist Petitioner with an application for leave to appeal if Petitioner entered a conditional plea or if the judge departed upward from the sentencing guidelines and that he might appoint appellate counsel if Petitioner preserved an outcome-determinative challenge to the scoring of the

sentencing guidelines. J.A. 22-23. The judge did not advise Petitioner that he would otherwise refuse to appoint appellate counsel for him.

In preparation for Petitioner's sentencing, the probation department prepared two Sentencing Information Reports, one for each count, on which the probation agent scored the Michigan Sentencing Guidelines. J.A. 27-30. For case 00-019193-FH ("the first case"), the agent scored 10 points on Offense Variable 9 ("OV 9"), J.A. 28, for the alleged existence of "2-9 victims," Michigan Sentencing Guidelines Manual at 31, Br. Opp. App. 31b, even though Petitioner had pleaded nolo contendere in that first case to a count involving only one victim. Similarly, the probation agent scored 25 points on OV 13, J.A. 28, for "a pattern of felonious criminal activity involving 3 or more crimes against a person," Manual at 32, Br. Opp. App. 32b, even though Petitioner had pleaded nolo contendere to a total of only two crimes. That scoring resulted in a guideline sentence range of 12 to 24 months for the minimum sentence. J.A. 28. The probation agent also scored 25 points for OV 13 in case 01-020597-FH ("the second case"). J.A. 30. That scoring resulted in a guideline sentence range of 29 to 57 months for the minimum sentence. J.A. 30.

At Petitioner's sentencing, his attorney did not object to the probation agent's guidelines scoring but did request that the sentences run concurrently. J.A. 33. The trial judge sentenced Petitioner to the top of the guidelines ranges for both cases (24 months to 15 years and 57 months to 15 years, respectively) and ordered the sentences to run consecutively. J.A. 35.

Shortly after his sentencing, Petitioner moved to withdraw his plea. The trial judge denied that motion, observing that the motion was untimely, that there had been no agreement as to whether Petitioner would receive concurrent sentences, and that Petitioner's "proper remedy is to appeal to the Michigan Court of Appeals." J.A. 43.

Petitioner filed two timely requests for appointment of appellate counsel, one for each of his cases. J.A. 46-50, 53-57. The trial judge promptly denied both requests by issuing form orders, on which he checked boxes to indicate that Petitioner had no constitutional right to appellate counsel and that he did not meet the criteria set forth in the statute for appointment of counsel. J.A. 44-45, 51-52.

Petitioner had 21 days from the date of his sentencing to file a timely application for leave to appeal to the Michigan Court of Appeals. Mich. Ct. R. 7.205(A). It would have effectively been impossible for Petitioner to file a timely application since the court reporter did not produce a transcript of the plea hearing until July 30, 2002, some seven months after the sentencing. J.A. 3, 5. Michigan law, however, allows an appellant who cannot file a timely application twelve months to file a delayed application, along with a statement of facts explaining the reason for the delay. Mich. Ct. R. 7.205(F).

On September 6, 2002, some nine months after his sentencing, Petitioner wrote the trial judge from prison and again requested appellate counsel. J.A. 58. In the letter and accompanying motion, Petitioner specifically explained that he believed his sentencing guidelines had been misscored and that, since the issue was unpreserved, he needed the assistance of appellate counsel to help him preserve the issue before proceeding with his appeal. J.A.

58, 61-62. Petitioner explained in the motion that he "required special education due to learning disabilities," that he was "a mentally impaired person," and that he had been forced to rely on assistance from a fellow inmate. J.A. 61, 62. Petitioner also cited the federal district court's decision in *Tesmer* in support of his claim that he was constitutionally entitled to the appointment of appellate counsel. J.A. 58. On October 25, 2002, the trial judge denied Petitioner's motion for appointment of appellate counsel in a brief order citing *Bulger* for the proposition that Petitioner "does not have a constitutional or statutory right to appointment of appellate counsel to pursue a discretionary appeal." J.A. 64.

On November 5, 2002, Petitioner filed a delayed application for leave to appeal in the Michigan Court of Appeals by filling out a form supplied to prisoners. J.A. 66-71. Petitioner checked a box to explain that the application was delayed because, among other reasons, "I needed to get help to complete this application." J.A. 67. In his application, Petitioner claimed that he had received ineffective assistance of trial counsel because his attorney, who was preoccupied with other cases, had not reviewed the scoring of the sentencing guidelines. J.A. 69. The application also observed that Petitioner's mental state "was established as having been deficient" and that the trial court had denied Petitioner's request for appellate counsel. J.A.70. Petitioner attached the motion for appointment of counsel he had filed in the trial court and asked the Court of Appeals to remand the case back to the trial court either for resentencing or "for consideration of the issues presented in his Motion for Appointment of Counsel and Remand for Evidentiary Hearing/Resentencing." J.A. 71.

On January 13, 2003, the Michigan Court of Appeals denied Petitioner's application for leave to appeal in a standard form order. The order recites that Petitioner's application was denied "for lack of merit in the grounds presented." J.A. 72.

Petitioner then filed an application for leave to appeal to the Michigan Supreme Court, to which he attached the orders of the trial court denying his request for appellate counsel. In his application to the Michigan Supreme Court, Petitioner again argued that his trial counsel provided ineffective assistance in failing to challenge the scoring of the sentencing guidelines. J.A. 78. He also claimed, with a citation to the Sixth Circuit's decision in *Tesmer*, that he was entitled to the appointment of appellate counsel to assist him with his ineffective assistance claim. J.A. 80-81.

On September 19, 2003, the Michigan Supreme Court declined to hear Petitioner's appeal from the order of the Michigan Court of Appeals by a vote of five to two. J.A. 84. Two justices would have ordered the trial court to appoint appellate counsel for Petitioner and the Michigan Court of Appeals to reconsider Petitioner's appeal after appellate counsel was appointed for Petitioner. J.A. 84-85.

SUMMARY OF ARGUMENT

The Michigan statute which resulted in the denial of appellate counsel to Petitioner violates the Fourteenth Amendment. An application for leave to appeal to the Michigan Court of Appeals is an appeal of right for purposes of *Douglas v. California*, 372 U.S. 353 (1963), and

not a "discretionary" appeal for purposes of *Ross v. Moffitt*, 417 U.S. 600 (1974).

There are two critical distinctions between *Douglas* and *Ross*. First, *Douglas* held that there is a right to appellate counsel for first-tier direct appeals, while *Ross* held that there is no such right for subsequent direct appeals and collateral appeals. Second, *Douglas* and *Ross* distinguished between appeals decided on the merits, for which the right to counsel attaches, and appeals that can be denied for any reason. Each of these distinctions compels the conclusion that Petitioner was entitled to counsel for his application to the Michigan Court of Appeals. Unlike the appeals at issue in *Ross*, an application for leave to appeal to the Michigan Court of Appeals from a plea-based conviction and sentence is a first-tier appeal, and the Court of Appeals actually decides that appeal on the merits. Therefore, Michigan must provide appellate counsel to Petitioner and others in his position, just as every other jurisdiction with a first-tier appeal by application has done since *Douglas*.

Even if *Douglas* did not directly dictate the result, the statute is still unconstitutional because it deprives indigents of meaningful access to Michigan's appellate system. The statute requires indigents such as Petitioner to overcome all of the procedural hurdles necessary to file a first direct appeal. As the Court has specifically recognized in the context of appeals from plea-based convictions, indigent laymen such as Petitioner cannot be expected to overcome those hurdles, nor can they be fairly expected to identify and coherently argue their own appellate issues. The narrow exceptions in the statute permit the appointment of appellate counsel only in very limited circumstances while denying counsel to indigents with

meritorious and complex issues, such as sentencing guidelines challenges, ineffective assistance of counsel claims, and double jeopardy issues. Meanwhile, moneyed defendants receive meaningful appellate review of sentencing or other errors committed in their cases.

Petitioner's case illustrates the constitutional deficiencies in the statute. Petitioner, a former special education student who required the assistance of a fellow inmate to file his first-tier appeal, attempted to raise a potentially meritorious ineffective assistance of trial counsel claim. Michigan precedent requires ineffective assistance claims to be raised on direct appeal and requires the defendant to hold an evidentiary hearing to create the necessary record on appeal. Petitioner, an incarcerated indigent with cognitive defects, could not possibly be expected to hold the evidentiary hearing necessary to his ineffectiveness claim without the assistance of appellate counsel. Lacking appellate counsel, Petitioner filed an application that failed to provide the record necessary to support the only claim it contained and completely failed to advance several other colorable claims for relief.

Finally, contrary to Respondent's suggestion, there was no waiver of Petitioner's constitutional right to appellate counsel. Michigan cannot constitutionally require indigents, and only indigents, to waive their right to the assistance of appellate counsel as a condition of receiving the substantial benefits of a guilty plea, just as Michigan cannot impose such discriminatory waivers on other groups. In any event, Petitioner never specifically waived his right to appellate counsel.

ARGUMENT

I. The Denial of Appointed Counsel to Petitioner on His Initial Direct Appeal on the Merits Violated His Fourteenth Amendment Right to Appellate Counsel.

As Respondent acknowledges, *Douglas v. California*, 372 U.S. 353 (1963), stands for the proposition that "if a State grants a right to a first appeal on the merits, then it generally cannot deny appointed counsel to an indigent." Br. Opp. 16-17. The Michigan statute at issue in this litigation, however, does precisely that.

Under the Michigan Constitution, Petitioner, along with all other felony defendants who plead guilty or nolo contendere to a felony, had a right to file an application for leave to appeal to the Michigan Court of Appeals. Mich. Const. 1963, art. I, § 20. Even though that court considers all properly-filed applications on the merits, Petitioner was forced to proceed on that first-tier appeal without counsel. Predictably, Petitioner's application completely failed to coherently argue potentially meritorious issues, and the Michigan Court of Appeals denied it for lack of merit. Moneyed defendants, on the other hand, receive meaningful appellate review of their applications for leave to appeal with the assistance of counsel.

There is not a single post-*Douglas* decision from any American jurisdiction, other than the Michigan Supreme Court's decision in *Bulger*, holding that counsel may be denied for a first direct appeal from a felony conviction. In fact, every state other than Michigan currently appoints counsel for indigents filing first direct appeals from felony convictions even if the convictions are obtained by plea and even if the appeals are by leave of the appellate court.

The statute is unconstitutional for two reasons. First, an appeal to the Michigan Court of Appeals from a plea-based conviction is not "discretionary" as the Court defined that term in *Douglas*, *Ross v. Moffitt*, 417 U.S. 600 (1974), and *Evitts v. Lucey*, 469 U.S. 387 (1985). A discretionary appeal for purposes of the Fourteenth Amendment is a second-tier appeal in which the appellate court's refusal to hear the appeal does not amount to a decision on the merits. An application for leave to appeal from a plea-based felony conviction in Michigan, by contrast, is a first-tier appeal that the Michigan Court of Appeals actually decides on the merits. Therefore, *Douglas* requires that counsel be appointed.

Second, even if the appeal to the Michigan Court of Appeals could be regarded as "discretionary," an indigent such as Petitioner who is denied counsel under the statute does not receive the "meaningful access" to the appellate system required by *Ross*. Unlike the indigents in *Ross*, a Michigan indigent denied counsel under the statute has not had any prior assistance of appellate counsel, has not had an attorney's assistance in identifying potentially meritorious appellate issues, does not have an appellate brief to use as a model, and may not even have a transcript unless he can figure out how to order one. As the Court has repeatedly recognized in appeals from plea-based convictions, an indigent on a first-tier appeal cannot be expected to even identify his own appellate issues, much less overcome the procedural obstacles necessary to perfect such an appeal. Petitioner's frustrated attempt to appeal from his convictions and sentences proves that an indigent cannot receive meaningful access to a first-tier appeal without the assistance of counsel.

A. Petitioner Was Entitled to Appellate Counsel Because an Application for Leave to Appeal to the Michigan Court of Appeals from a Plea-Based Felony Conviction Is Not a "Discretionary" Appeal Within the Meaning of *Douglas* and *Ross*.

1. "Discretionary" Appeals Do Not Include First-Tier Direct Appeals Decided on the Merits.

The Court held in *Douglas* that the Fourteenth Amendment requires states to appoint counsel for an indigent's first appeal from a felony conviction because "a State may not grant appellate review in such a way as to discriminate against some convicted defendants on account of their poverty." 372 U.S. at 355. An indigent defendant forced to represent himself on his first appeal has "only the right to a meaningless ritual, while the rich man has a meaningful appeal." *Douglas*, 372 U.S. at 358. The Court carefully distinguished the "first appeal" at issue in *Douglas* from subsequent discretionary appeals:

> We are not here concerned with problems that might arise from the denial of counsel for the preparation of a petition for discretionary or mandatory review *beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court*. We are dealing only with the *first appeal*, granted as a matter of right to rich and poor alike from a criminal conviction. We need not decide whether California would have to provide counsel for an indigent seeking a discretionary hearing from the California Supreme Court

> *after the District Court of Appeal had sustained his conviction. . . .*

Id. at 356 (emphasis added; citations omitted).

By using the phrase "of right" in *Douglas*, the Court thus distinguished a first appeal to the California Court of Appeal, which that court decided on the merits, from a subsequent appeal to the California Supreme Court, which could be denied for any reason. The Court did not distinguish between first-tier direct appeals that automatically receive full review and first-tier direct appeals that require leave of the appellate court because California did not have such a system. The Court had no reason to elaborate because almost all first appeals from felony convictions in the United States were, and are, automatic appeals. *See Bundy v. Wilson*, 815 F.2d 125, 136-42 (1st Cir. 1987) (demonstrating that, as of 1987, 47 states and the federal government provided automatic appeals from felony convictions).

In *Ross*, the Court addressed the issue *Douglas* left open: whether the right to counsel extended to a second-tier, discretionary appeal to a state supreme court. The second-tier appeal in North Carolina was truly "discretionary" because the North Carolina Supreme Court's refusal to hear an appeal was not a decision on the merits. *Ross*, 417 U.S. at 615. Instead, the North Carolina Supreme Court heard an appeal from the North Carolina Court of Appeals only if the case attracted public interest, was of major significance to the jurisprudence of the state, or involved a conflict with a decision of the state supreme court. *Id.* at 614.

The Court in *Ross* held that the Fourteenth Amendment did not require the appointment of counsel for such a second-tier appeal. *Id.* at 610-16. In reaching this conclusion, the Court relied on two factors. First, appointment of appellate counsel was not essential because the defendant had already received the benefit of appellate counsel in his first appeal to the state court of appeals:

> Thus, prior to his seeking discretionary review in the State Supreme Court, his claims had "once been presented by a lawyer and passed upon by an appellate court." We do not believe that it can be said, therefore, that a defendant in respondent's circumstances is denied meaningful access to the North Carolina Supreme Court simply because the State does not appoint counsel to aid him in seeking review in that court.

Id. at 614-15 (quoting *Douglas*, 372 U.S. at 356).

Second, the Court heavily relied on the fact that the North Carolina Supreme Court's decision to grant review was truly "discretionary," that is, not dependent on "whether there has been a correct adjudication of guilt in every individual case." *Id.* at 615 (internal quotation marks and citation omitted). Instead, *Ross* recognized that discretionary review at the second tier is designed only to identify important cases, not to correct error: "Once a defendant's claims of error are organized and presented in a lawyerlike fashion to the Court of Appeals, the justices of the Supreme Court of North Carolina who make the decision to grant or deny discretionary review should be able to ascertain whether his case satisfies the standards established by the legislature for such review." *Id.*

The Court summarized these two points: "both the opportunity to have counsel prepare an initial brief in the Court of Appeals and the nature of discretionary review in the Supreme Court of North Carolina make this relative handicap far less than the handicap borne by the indigent defendant denied counsel on his initial appeal as of right in *Douglas*." *Id.* at 616.

The entire rationale of *Ross* collapses when applied to any *first* appeal that is decided *on the merits*, regardless of whether that first appeal is automatic or by application for leave to appeal. This conclusion is dictated by a fair reading of *Douglas* and *Ross* as well as by numerous decisions of the Court subsequent to *Douglas* and *Ross*.

The Court has repeatedly confirmed that the holding in *Ross* is limited to second-tier or collateral appeals. In *United States v. MacCollom*, 426 U.S. 317, 324 (1976), the plurality explained that "in [*Ross*], we declined to extend [*Douglas*] to a discretionary second appeal from an intermediate appellate court to the Supreme Court of North Carolina." In *Murray v. Giarratano*, 492 U.S. 1, 9 (1989), the Court cited *Douglas* for the proposition that an indigent is "entitled as a matter of right to counsel for an initial appeal from the judgment and sentence of the trial court," while *Ross* established that the right to counsel at the trial and initial appeal stages "did not carry over to a discretionary appeal provided by North Carolina law from the intermediate appellate court to the Supreme Court of North Carolina."

The Court's clearest statement of the distinction between *Douglas* and *Ross* is found in *Evitts v. Lucey*, 469 U.S. 387 (1985). In response to a Kentucky criminal

defendant's claim that he had received ineffective assistance of appellate counsel, the warden argued on the basis of *Ross* that there was no right to counsel in the Kentucky Court of Appeals since such an appeal is "conditional." The Court rejected this argument, holding that the "discretionary appeal" discussed in *Ross* did not refer to any first direct appeal decided on the merits:

> Unlike the appellant in the discretionary appeal in *Ross*, a criminal appellant in the Kentucky Court of Appeals typically has not had the benefit of a previously prepared trial transcript, a brief on the merits of the appeal, or a previous written opinion. In addition, petitioners fail to point to any source of Kentucky law indicating that a decision on the merits in an appeal like that of respondent – unlike the discretionary appeal in *Ross* – is contingent on a discretionary finding by the Court of Appeals that the case involves significant public or jurisprudential issues; the purpose of a first appeal in the Kentucky court system appears to be precisely to determine whether the individual defendant has been lawfully convicted. In short, a criminal defendant bringing an appeal to the Kentucky Court of Appeals has not previously had an adequate opportunity to present his claims fairly in the context of the State's appellate process. It follows that for purposes of analysis under the Due Process Clause, respondent's appeal was an appeal as of right, thus triggering the right to counsel recognized in [*Douglas*].

Evitts, 469 U.S. at 402 (citations and quotation marks omitted).

Six years after *Evitts*, the Court again made it clear in *Coleman v. Thompson*, 501 U.S. 722 (1991), that the

Douglas right to counsel attaches to an initial criminal appeal, even if that first appeal is by application for leave to appeal. *Coleman* involved a habeas corpus petition challenging a Virginia conviction. Even though the first appeal in Virginia is by application, the Virginia Supreme Court had long held that *Douglas* required the appointment of counsel for that appeal. *See Cabaniss v. Cunningham*, 143 S.E.2d 911, 913-14 (Va. 1965). In *Coleman*, the Court explicitly approved that conclusion: "Cabaniss had defaulted the direct appeal of his criminal conviction because the trial court had failed to honor his request for appointed counsel on appeal, a request the court was required to honor under the Constitution. *See Douglas v. California,* 372 U.S. 353 (1963)." *Coleman*, 501 U.S. at 742 (internal citation omitted).

In *Smith v. Robbins*, 528 U.S. 259 (2000), the Court upheld a California rule allowing an indigent's appellate counsel to file an "*Anders* brief" that does not specify any potential appellate issues. *See Anders v. California*, 386 U.S. 738 (1967). In arriving at this conclusion, the Court revisited its pre-*Douglas* decision in *Ellis v. United States*, 356 U.S. 674 (1958). *Smith*, 528 U.S. at 270-71, 278-81. Under the federal rules in effect at the time *Ellis* was decided, an indigent convicted in federal district court who wished to appeal had to file an "application for leave to appeal in forma pauperis" in the court of appeals. *Ellis*, 356 U.S. at 674. In *Ellis*, the Court peremptorily reversed the court of appeals' refusal to appoint counsel before denying the indigent's application for leave to appeal, observing: "Normally, allowance of an appeal should not be denied until an indigent has had adequate representation by counsel." *Id.* at 675.

Since *Ellis* was decided before *Douglas*, the rule announced in *Ellis* was not based on the Fourteenth Amendment. However, in *Smith*, the Court indicated that the constitutional rule announced in *Douglas* would have dictated the result reached in *Ellis*:

> Although we did not, in *Anders*, explain in detail why the [former] California procedure was inadequate under each of these precedents, our particularly heavy reliance on *Ellis* makes clear that a significant factor was that the old California procedure did not require either counsel or the court to determine that the appeal was frivolous; instead, the procedure required only that they determine that the defendant was unlikely to prevail on appeal. *Compare Anders, supra*, at 741-742 ("If counsel is convinced, after conscientious investigation, that the appeal is frivolous, of course, he may ask to withdraw. If the court agrees with counsel's evaluation of the case, then leave to withdraw may be allowed and leave to appeal may be denied.") (quoting *Ellis*, *supra*, at 675).

Smith, 528 U.S. at 279 (internal ellipses and quotation marks omitted).

The *Smith* Court also cited *Ellis* in support of the following statement: "Although an indigent whose appeal is frivolous has no right to have an advocate make his case to the appellate court, such an indigent does, in all cases, have the right to have an attorney, zealous for the indigent's interests, evaluate his case and attempt to discern nonfrivolous arguments." *Id.* at 279, n.10 (citing *Ellis*, 356 U.S. at 675; additional citation omitted). Thus, the Court in *Smith* regarded the *Ellis* requirement that counsel be appointed to evaluate the case before an

indigent's first-tier application for leave to appeal is denied as part of the constitutional minimum dictated by *Douglas*.

Given these decisions from the Court, it is not surprising that, with the single exception of the Michigan Supreme Court's decision in *Bulger*, no state or federal appellate court since *Douglas* has ever held that an indigent may be denied the assistance of appellate counsel for a first direct felony appeal, even if that first appeal is by leave and even if it follows a plea-based conviction. The relatively few courts to reach the question have uniformly held, with the exception of *Bulger*, that counsel must be appointed for first-tier applications for leave to appeal. *See, e.g., Cabaniss*, 143 S.E.2d at 913-14 (holding that counsel must be appointed for first-tier petition to appeal to Virginia appellate court); *State v. Trowell*, 739 So. 2d 77, 80-81 (Fla. 1999) (holding that *Douglas* guarantees counsel for petition to appeal from guilty plea); *Perez v. State*, 4 S.W.3d 305, 307 (Tex. Ct. App. 1999) (same); *see also Bundy*, 815 F.2d at 130 (concluding that *Douglas*, not *Ross*, governs first-tier petition to appeal to New Hampshire Supreme Court). Indeed, a federal court has recently rejected *Bulger* itself and granted habeas relief to Mr. Bulger. *See Bulger v. Curtis*, 328 F. Supp. 2d 692, 701-03 (E.D. Mich. 2004) (concluding that Michigan Supreme Court's decision in *Bulger* was an "objectively unreasonable application" of *Douglas* and *Ross*).

With the exception of Michigan, every state automatically provides appellate counsel for indigents pursuing first-tier appeals. Since New Hampshire recently changed its system to provide for automatic first-tier appeals to the New Hampshire Supreme Court, *see* N.H. S. Ct. R. 4, 7, Virginia and West Virginia are currently the only two

states in which first-tier criminal appeals are generally by application or petition. Both Virginia and West Virginia automatically provide counsel to indigents pursuing those appeals. Va. Code § 19.2-163.3; W.Va. R. Crim. P. 44(a). In at least five other states besides Michigan, certain types of first-tier appeals are by application or petition. *See* Me. R. App. P. 20 (sentencing appeals); Md. Code Ann. § 12-1302(e) (appeals from plea-based convictions); N.Y. Crim. Proc. L. §§ 450.10(1), 450.15 (certain sentencing appeals from plea-based convictions); N.C. Gen. Stat. § 15A-1444(e) (certain appeals from plea-based convictions); Okla. Stat. Tit. 22 § 1051(a) (appeals from plea based convictions). Unlike Michigan, all five of these states automatically provide appellate counsel to assist indigents who wish to file such applications or petitions. *See* Me. R. Crim. P. 44(a)(2); Md. Code Ann., art. 27A § 4; N.Y. County Law § 717(1); N.C. Gen. Stat. § 7A-451; Okla. Stat. Tit. 22 § 1356.

Thus, with the exception of the Michigan Supreme Court in *Bulger*, every state and federal court to consider the question since *Douglas* has concluded that an indigent felony defendant is entitled to the assistance of counsel for a first-tier appeal even if that appeal is by petition or application and even if the appeal follows a plea. With the exception of Michigan, every state with a first-tier appeal by petition or application automatically provides counsel to indigents by statute or court rule. This near unanimity of practice reflects a clear and longstanding consensus that *Douglas*, not *Ross*, governs such appeals.

2. Petitioner's Appeal to the Michigan Court of Appeals Was Not "Discretionary."

It is clear from *Douglas*, *Ross*, and all of the authority interpreting and applying those two cases that Petitioner's application for leave to appeal to the Michigan Court of Appeals, like the application for leave to appeal in *Ellis*, was an appeal for which he was entitled to appellate counsel. An application for leave to appeal to the Michigan Court of Appeals is a *first appeal*; that is, Petitioner did not already have "a brief on the merits of the appeal, or a previous written opinion" on the issues he wished to present, and he "ha[d] not previously had an adequate opportunity to present his claims fairly in the context of the State's appellate process." *Evitts*, 469 U.S. at 402. Therefore, even those very few states that actually have or previously had truly "discretionary" first appeals have uniformly provided appellate counsel. *See, e.g., Rhodes v. Leverett*, 239 S.E.2d 136, 140 (W. Va. 1977) (holding state constitution guarantees counsel for discretionary first-tier petition to appeal); *State v. Cooper*, 498 A.2d 1209, 1213 (N.H. 1985) (holding state constitution and statutes guarantee counsel for former discretionary first-tier petition to appeal); *cf. Bundy*, 815 F.2d at 130 (concluding *Douglas* governs former first-tier discretionary appeal in New Hampshire).

Unlike the system in West Virginia and the former system in New Hampshire, Petitioner's first-tier appeal to the Michigan Court of Appeals was not "discretionary" in any sense because the entire purpose of that appeal was to determine whether he had been lawfully convicted and sentenced. *Evitts*, 469 U.S. at 402. Thus, the Michigan Court of Appeals, like the Virginia appellate courts discussed in *Coleman*, actually made a decision on the *merits* of Petitioner's application, J.A. 72, just as it does for any properly filed application for leave to appeal. *Cf. Jackson v. Virginia*, 443 U.S. 307, 311 n.4 (1979) ("Each petition for writ of error under Va. Code § 19.2-317 (1975) is reviewed on the merits . . . and the effect of a denial is to affirm the judgment of conviction on the merits."). Therefore, when Petitioner received a Michigan Court of Appeals standard order denying leave to appeal from a plea-based conviction, that order stated, "The Court orders that the defendant-appellant's delayed application for leave to appeal is DENIED *for lack of merit in the grounds presented*." J.A 72 (emphasis added).

Despite Respondent's claim to the contrary, Br. Opp. 22-26, the Michigan Court of Appeals has held many times that its orders denying leave to appeal "for lack of merit in the grounds presented" are conclusive determinations of the merits of the issues presented. The Michigan Court of Appeals firmly established this principle in three published opinions issued more than twenty years ago. *See People v. Hayden*, 348 N.W.2d 672, 684 (Mich. Ct. App. 1984) ("[A]nother panel of this Court denied defendant's motion to remand on this same issue 'for lack of merit in the grounds presented.' Therefore, we are precluded from reaching the merits of this issue by the law of the case doctrine."); *People v. Douglas*, 332 N.W.2d 521, 523 (Mich. Ct. App. 1983) (same); *People v. Wiley*, 315 N.W.2d 540, 541 (Mich. Ct. App. 1981) (same).

The Michigan Court of Appeals continues today to routinely and frequently apply its decisions in *Hayden*, *Douglas*, and *Wiley* to conclude that its orders denying leave to appeal "for lack of merit in the grounds presented" are conclusive decisions on the merits. *See, e.g., Contineri v. Clark*, No. 237739, 2003 WL 21771236, at *2 (Mich. Ct.

App. Jul. 31, 2003) (holding that since order denying previous application for leave to appeal "for lack of merit in the grounds presented" "did, in fact, express an opinion on the merits," law of the case doctrine applied); *see also People v. Lathon*, No. 252936, 2005 WL 77151, at *5 (Mich. Ct. App. Jan. 13, 2005); *People v. Weathers*, No. 238494, 2003 WL 21362810, at *4 (Mich. Ct. App. Jun. 12, 2003); *Sabaugh v. Riga*, No. 233687, 2003 WL 21362981, at *2 (Mich. Ct. App. Jun. 12, 2003); *Rusiecki v. SADO*, No. 235206, 2002 WL 1277042, at *3 (Mich. Ct. App. Jun. 4, 2002); *DiCicco v. City of Grosse Pointe Woods*, No. 222751, 2002 WL 346126, at *3 (Mich. Ct. App. Mar. 1, 2002).

The Michigan Supreme Court also recognizes that such orders of the Michigan Court of Appeals are conclusive determinations of the merits. *See People v. Walker*, 653 N.W.2d 621, 622, 623 n.5 (Mich. 2002) (Corrigan, C.J.) (observing that order denying application "for lack of merit in the grounds presented" demonstrated that the "Court of Appeals reviewed the substantive arguments advanced in the application and concluded that they lacked merit," and that "the Court of Appeals plainly considered the merits of defendant's arguments"); *id.* at 624 (Kelly, J., dissenting) (agreeing that order demonstrated that "Court of Appeals reached the merits of the claims presented"). The Sixth Circuit has recently reached the same conclusion. *See Abela v. Martin*, 380 F.3d 915, 923 (6th Cir. 2004) (holding that Michigan Court of Appeals' decision denying leave to appeal "for lack of merit in the grounds presented" was "a merits determination" for purposes of habeas corpus).

Respondent nevertheless claims, with citations to three cases, *Great Lakes Realty Corp. v. Peters*, 57 N.W.2d 901 (Mich. 1953); *People v. Berry*, 157 N.W.2d 310 (Mich. Ct. App. 1968); and *State v. Bobenal Investment*, 314

N.W.2d 512 (Mich. Ct. App. 1981), that a Michigan Court of Appeals order denying an application for lack of merit is not a decision on the merits. Br. Opp. 22-24. However, none of these cases even arguably stands for that proposition; indeed, the phrase "lack of merit in the grounds presented" never appears in any of these cases. In *Peters*, 57 N.W.2d at 903, the Michigan Supreme Court simply observed that its standard order denying an application for leave to appeal, which never expresses an opinion on the merits, does not amount to an affirmance. In *Berry*, 157 N.W.2d at 311-12, and *Bobenal*, 314 N.W.2d at 514 n.2, the Michigan Court of Appeals simply refused to apply the law of the case doctrine without ever stating whether the prior applications had been denied for lack of merit or for some other reason.

In any event, all three of these cases predate the Michigan Court of Appeals' decisions in *Hayden*, *Douglas*, and *Wiley*, in which the court squarely held that its orders finding "lack of merit in the grounds presented" were decisions on the merits. It is now beyond reasonable dispute that the Michigan Court of Appeals regards such orders as conclusive decisions on the merits, as does the Michigan Supreme Court and the Sixth Circuit.

By using the term "discretionary" to describe an application to the Michigan Court of Appeals, Respondent is attempting to have its cake and eat it too. By calling the appeal "discretionary," Respondent hopes to avoid appointing appellate counsel to indigents such as Petitioner, but by having such appeals decided on the merits, Respondent receives the substantial benefit of barring Petitioner and others in his position from ever relitigating the issues presented in their *pro se* appeals.

The system that Michigan has set up for appellate review of plea-based convictions and sentences is, in reality, simply an example of the type of expedited or screened first-tier appeals found in several other states. *See, e.g.*, Nev. R. App. P. 3C (creating "fast track" appellate system for certain types of first-tier criminal appeals); Va. Code § 17.1-406(A) (providing first-tier appeal by petition for leave to appeal). Criminal defendants in such systems have the right to file such an appeal, the appeals are decided on the merits, and counsel is automatically appointed for indigents. *See* Nev. Rev. Stat. § 178.397 (requiring appointment of counsel for indigents on first-tier appeal); Va. Code § 19.2-163.3(c) (same).

Even if the Michigan Court of Appeals did not decide applications for leave to appeal on the merits, Petitioner would still have been entitled to appellate counsel to assist with his application. The prior assistance of appellate counsel and the provision of the other basic tools of appellate advocacy on a first-tier appeal were crucial to the conclusion in *Ross* that a state need not provide counsel for subsequent appeals. *Ross*, 417 U.S. at 614-16. Thus, those few states that have or formerly had first-tier direct appeals not decided on the merits have unanimously provided appellate counsel to indigents.

In sum, an application for leave to appeal to the Michigan Court of Appeals is not a discretionary appeal within the meaning of *Douglas, Ross*, or *Evitts*. It is a first-tier direct appeal. Criminal defendants have a state constitutional right to file such an appeal. And the appeal is decided on the merits. Like every other first-tier direct appeal from a felony conviction in the United States, it is an appeal for which counsel must be provided under *Douglas*.

Therefore, Petitioner's Fourteenth Amendment rights were violated when his requests for appointment of appellate counsel were denied. He is accordingly entitled to have the order of the Michigan Court of Appeals denying his application vacated, to have appellate counsel appointed for him, and to be given an opportunity to file a new application for leave to appeal to the Michigan Court of Appeals with the assistance of counsel. *See Penson v. Ohio*, 475 U.S. 75, 88-89 (1988) (holding that denial of appellate counsel requires automatic relief without showing of prejudice).

B. Petitioner and Other Indigent Defendants Forced To File Applications for Leave To Appeal Without Counsel Receive a "Meaningless Ritual" Instead of Meaningful Appellate Review.

Even if *Ross*, rather than *Douglas*, governed an application for leave to appeal to the Michigan Court of Appeals, the denial of appellate counsel to indigent defendants such as Petitioner still violates the Fourteenth Amendment because an indigent forced to proceed without counsel has "only the right to a meaningless ritual, while the rich man has a meaningful appeal." *Douglas*, 372 U.S. at 358. Petitioner's case proves the point.

1. As Petitioner's Case Demonstrates, an Indigent Cannot Identify or Coherently Argue Appellate Issues Arising From His Plea-Based Appeal or Overcome the Procedural Hurdles Arising in a First-Tier Appeal.

Respondent claims that the distinctions between convictions following trials and convictions following guilty

pleas justify the denial of Petitioner's requests for appellate counsel. Br. Opp. 18-20. The most obvious objection to this claim that *Douglas* should not apply to plea-based convictions is that it finds no support in *Douglas* or in any of the Court's other cases. On the contrary, the Court has consistently recognized that a typical indigent such as Petitioner is incapable of identifying and raising any kind of issue in a first direct appeal, no matter how simple it might be, without the assistance of counsel. Thus, in *Roe v. Flores-Ortega*, 528 U.S. 470, 486 (2000), the Court specifically recognized, *in an appeal from a guilty plea*, "[i]t is unfair to require an indigent, perhaps *pro se*, defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal."

A guilty plea does limit the number of potential appellate issues, but many potential appellate issues of all levels of complexity remain. After pleading guilty, Michigan defendants retain the right to challenge dozens of different types of errors, including Double Jeopardy Clause violations, ineffective assistance of trial counsel, improper imposition of consecutive sentences, excessive or improper restitution and forfeiture orders, erroneous denials of credit for prior incarceration, breaches of plea bargains at sentencing, denials of allocution, and violations of *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531 (2004).

In 1999, the Michigan Legislature enacted a sentencing guideline scheme that rivals its federal counterpart in complexity. *See* Mich. Comp. Laws § 777.1, *et seq.* Despite that complexity, a Michigan trial judge "may," but is not required to, appoint appellate counsel for an indigent who

has preserved an outcome-determinative challenge to the judge's own scoring of the sentencing guidelines. In other words, the statute requires most indigents to litigate complex sentencing guidelines questions, many of which are questions of first impression in Michigan, on their own.

As the Court specifically recognized in *Flores-Ortega*, 528 U.S. at 486, a typical indigent plea defendant is completely incapable of even identifying his meritorious appellate issues, much less capable of arguing them coherently so that the Michigan Court of Appeals can decide whether to review them. *See also Martinez v. Court of Appeal of California*, 528 U.S. 152, 161 (2000) (recognizing that even if counsel is ineffective, "it is reasonable to assume that counsel's performance is more effective than what the unskilled appellant could have provided for himself").

Petitioner's case illustrates the difficulties a typical indigent defendant faces under the statute. Petitioner, who has explained that he is a former special education student and a mentally impaired person with learning disabilities, J.A. 61-62, was forced to file his own application for leave to appeal after the trial judge repeatedly denied his requests for appellate counsel.

In that application, Petitioner, aided by a fellow prisoner, attempted to raise the claim that he had received ineffective assistance of counsel from his trial attorney who had failed to object to the scoring of the sentencing guidelines. J.A. 68. Indeed, Michigan law ordinarily requires criminal defendants to raise ineffective assistance claims on direct appeal. *See generally People v. Ginther*, 212 N.W.2d 922 (Mich. 1973).

Petitioner's attempt to obtain meaningful review of his ineffective assistance claim was doomed from the outset because Michigan law also requires the defendant to create the record necessary for an ineffective assistance claim by first holding an evidentiary hearing in the trial court before proceeding with the appeal to the Michigan Court of Appeals. *See Ginther*, 212 N.W.2d at 925; *see also People v. Mitchell*, 560 N.W.2d 600, 612 (Mich. 1997) (holding that defendant must present testimony of trial counsel, who is "necessary witness" at ineffective assistance hearing, before proceeding with appeal).

In other words, to preserve his ineffective assistance claim, Petitioner was required to hold an evidentiary hearing in the trial court in which he would have had to call and examine witnesses, including his own trial attorney, all without the assistance of counsel. With the assistance of another inmate, Petitioner did actually manage to point out to the trial court in his renewed motion for appointment of counsel that he needed to hold an evidentiary hearing on the ineffective assistance claim, J.A. 60-62, but the trial court, as required by the statute and the Michigan Supreme Court's decision in *Bulger*, had no choice but to deny the request. J.A. 64.

Thus, Petitioner, who could not possibly be expected to organize and conduct an evidentiary hearing without the assistance of counsel (or even another prisoner), had no option but to present his ineffective assistance claim to the Michigan Court of Appeals without the necessary record support. Without the necessary record, it was a foregone conclusion that the Michigan Court of Appeals would deny relief.

In addition, Petitioner's written argument to the Michigan Court of Appeals demonstrates that even if Petitioner had received an incompetent appellate attorney, "it is reasonable to assume that counsel's performance [would have been] more effective than what the unskilled appellant could have provided for himself." *Martinez*, 528 U.S. at 161. In his application, Petitioner claimed that trial counsel was ineffective for failing to object to the scoring of the sentencing guidelines, but Petitioner neglected to identify the guidelines scores to which trial counsel should have objected. J.A. 68. Thus, even aside from his inability to create the record necessary for appellate review, Petitioner (or, more precisely, Petitioner's fellow prisoner) was completely incapable of coherently articulating the claim he was attempting to make.

In fact, there were obvious grounds to object to the scoring of several of Petitioner's sentencing guideline variables. For example, Petitioner received 10 points on Offense Variable 9 ("OV 9") in the first case for multiple victims, J.A. 28, notwithstanding the fact that Petitioner had entered a plea to a single count involving a single victim in that first case. J.A. 23. Indeed, Respondent concedes in this Court that "OV 9 may have been scored incorrectly." Br. Opp. 29. In both cases, Petitioner received 25 points on OV 13 for a pattern of three or more crimes against persons, J.A. 28, 30, even though Petitioner had entered a plea to only two crimes. J.A. 23. While Respondent is correct that this variable allows for the scoring of other crimes committed within a five-year period, Br. Opp. 30, neither the judge nor anyone else ever made a finding that Petitioner committed more than two crimes during that period.

If both variables had been scored at zero, the top of the guidelines range on the first case would have been 17 months (guidelines grid cell A-II), and the top of the guidelines range on the second case would have been 24 months (grid cell C-II). Michigan Sentencing Guidelines Manual, Br. Opp. App. 97b. Petitioner thus may have received a sentence seven months longer than the top of the proper guidelines range for his first case and a sentence thirty-three months longer than the top of the proper guidelines range in the second case.

To make matters even worse, Petitioner's application to the Michigan Court of Appeals completely omitted at least two other potentially meritorious claims for relief that are apparent on the record. First, the trial judge stated on the record at the plea hearing that he found the factual basis necessary to accept Petitioner's nolo contendere plea for one of the two cases by reviewing the preliminary examination, J.A. 24, even though the docket entries reveal that the preliminary examination was waived in both cases. J.A. 1, 4. *See, e.g., People v. Booth*, 324 N.W.2d 741, 748 (Mich. 1982) (discussing requirement that judge find factual basis to support nolo contendere plea). Second, the trial judge rejected Petitioner's request for concurrent sentencing and ordered Petitioner's two sentences to run consecutively without providing any explanation for that decision. J.A. 35. *See, e.g., People v. Gjidola*, 364 N.W.2d 698, 705 (Mich. Ct. App. 1985) (noting that trial judge's decision to impose consecutive sentencing reviewed for abuse of discretion).

Finally, if Petitioner had received the assistance of appellate counsel, that attorney may well have discovered and raised additional appellate issues. For example, an

appellate attorney might have argued for Petitioner that the entire mandatory Michigan sentencing guidelines scheme is unconstitutional in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Such an attack on the Michigan sentencing guidelines may or may not ultimately succeed. *Compare Blakely*, 125 S.Ct. at 2549 (O'Connor, J., dissenting) (noting that majority decision "casts constitutional doubt" on, *inter alia*, Michigan sentencing guidelines scheme), *with People v. Claypool*, 684 N.W.2d 278, 286 n.14 (Mich. 2004) (stating, in dicta, that "the Michigan system is unaffected by the holding in *Blakely*"). Whether or not a *Blakely* challenge to the Michigan sentencing guidelines ultimately succeeds, it would be absurd to expect a typical indigent defendant such as Petitioner to identify such a complex constitutional issue and argue it coherently without the assistance of counsel.

Petitioner was, in short, plainly denied meaningful access to the Michigan Court of Appeals. If Petitioner had funds to hire an appellate attorney, that attorney would have held the evidentiary hearing necessary to preserve the ineffective assistance claim, and Petitioner then would have received meaningful review of that claim. If Petitioner had funds to hire an appellate attorney, that attorney would have, at the very least, known that he would need to identify the guidelines scores to which trial counsel should have objected. If Petitioner had funds to hire an appellate attorney, that attorney presumably would have discovered the other arguable claims for appellate relief on the face of the trial court record and would have raised other claims, such as a *Blakely*-type challenge, that are not apparent on the record.

By any standard, Petitioner was denied meaningful review in the Michigan Court of Appeals, and he was

denied that meaningful review solely because he is indigent. That denial therefore violated the Fourteenth Amendment.

The circumstances establishing that Petitioner was denied meaningful access to the Michigan Court of Appeals are hardly unique to him. Like Petitioner, many other inmates have mental disabilities and other characteristics that render them completely incapable of prosecuting their own first-tier appeals. For example, approximately seventy percent of all inmates in the United States are functionally illiterate. *See* U.S. Dep't of Educ., *Literacy Behind Prison Walls*, NCED 1994-102 at 10, 17.

As Petitioner's case demonstrates, even if the appellate issues actually had been simple, a typical indigent such as Petitioner has no real chance of overcoming the *procedural* hurdles necessary to have those issues considered by the appellate court. As the Court put it in *Evitts*, 469 U.S. at 396, "[t]o prosecute the appeal, a criminal appellant must face an adversary proceeding that – like a trial – is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant – like an unrepresented defendant at trial – is unable to protect the vital interests at stake."

The Michigan Supreme Court has provided another excellent example of the "hopelessly forbidding" procedural hurdles indigent plea defendants face under the statute. In *People v. Plaza*, 617 N.W.2d 687 (Mich. 2000), the court refused to hear an appeal from an indigent plea defendant, forced to proceed without counsel, whose application for leave to appeal to the Michigan Court of Appeals had been denied after he had failed in his efforts to obtain his

sentencing transcript. In a concurrence to that denial, the author of the *Bulger* opinion explained that "defendant never raised the issue of his failure to receive the sentencing transcript. . . . Defendant had an opportunity to direct the attention of the Court of Appeals to his troubles in obtaining a copy of the sentencing transcript, but he failed to do so." *Id.* (Corrigan, C.J., concurring). In other words, the defendant, who was forced to proceed *pro se*, waived his right to appellate review of his sentence because he failed to specifically claim in his appeal that he had been wrongfully denied his sentencing transcript.

Petitioner's inability to hold the evidentiary hearing in support of his ineffectiveness claim and Plaza's inability to obtain his sentencing transcript are illustrative of the point from *Evitts* that the appellate procedure involved in any first direct appeal is "hopelessly forbidding" for non-lawyers. To perfect an appeal, an indigent who may well be illiterate, mentally ill, or unfamiliar with the English language, must figure out how to obtain the "register of actions," all of the transcripts, the sentencing information reports, his or her prisoner account statement, and the judgment of sentence. Then he or she must make the requisite number of copies of all of these documents, which must be served and filed (with proof of service), along with a motion to waive fees, an affidavit of indigency, and the application for leave to appeal itself. The application for leave to appeal itself requires the indigent to fill out another long and complicated form, *see* J.A. 66-71, on which he or she is supposed to identify and argue his or her own appellate issues in the tiny spaces provided (or attach additional pages), and identify the controlling legal authorities that support his or her arguments. If the indigent fails to overcome any one of these numerous

procedural hurdles, he or she can expect to have the application denied without any real consideration of the issues.

These obstacles are far greater than those faced by the indigents in *Ross*, who already had the benefit of transcripts, appellate court opinions, and, most critically, their lawyers' briefs from their first-tier appeals identifying and arguing their appellate issues. As Petitioner's case proves, a typical indigent cannot expect to receive meaningful access to appellate review simply because the appeal is from a plea-based conviction.

2. The Statutory Exceptions Do Not Make the Statute Constitutional.

As Petitioner's case demonstrates, the fact that the statute has a few narrow exceptions cannot save it. The statute requires the appointment of counsel in only four circumstances: (1) to defend a prosecutor's appeal; (2) if the sentence amounts to an upward departure from the sentencing guidelines range; (3) if the Michigan Court of Appeals grants the indigent's application for leave to appeal; or (4) if the plea was conditional. Mich. Comp. Laws § 770.3a(2).

The first and third exceptions, by definition, could not apply to Petitioner or to any other indigent defendant who requests the assistance of appellate counsel to file an application for leave to appeal to the Michigan Court of Appeals. The third exception simply means that Petitioner would have received counsel if and only if he had somehow been able, without the assistance of counsel, to overcome the procedural hurdles that prevented him from creating an adequate record for appeal, to identify the potentially

meritorious issues for appeal, and to coherently argue those potentially meritorious issues in his application so that the Michigan Court of Appeals granted leave to appeal. In other words, Petitioner had no chance of ever getting to the point where the third exception could possibly apply, and the same is true for almost all indigent defendants.

The fourth exception, for conditional pleas, is also useless to Petitioner and the vast majority of indigents who need the assistance of counsel. First, there is no right in Michigan to enter a conditional plea, and such pleas are very rare in Michigan because they require the consent of both the judge and the prosecutor. *See* Mich. Ct. R. 6.301(C)(2) (providing that a defendant may enter a conditional plea "only with the consent of the court and the prosecutor"). Second, a defendant can enter a conditional plea only to challenge "pretrial rulings." *Id.* But in Petitioner's case, there were no contested pretrial rulings of any kind.

In fact, most appeals after guilty pleas concern sentencing issues, *see* Matuszak, *supra*, 73 U. Det. Mercy L.Rev. at 438, while other issues may arise during the plea taking proceeding. In other words, the possibility of a conditional plea is of no use at all to a typical indigent plea defendant whose complaint arises not from some pretrial ruling but from the sentence the judge imposed or from the plea itself.

The only other statutory exception is for indigents who receive an upward departure from the sentencing guidelines. While such indigents unquestionably need the assistance of appellate counsel, they are not the only ones who may have meritorious appellate issues. Indeed, the

statute permits a trial judge to deny appellate counsel to an indigent who receives a sentence that would have been an upward departure if the trial judge had scored the guidelines correctly, even when the indigent's trial attorney has preserved his challenge to the trial judge's scoring. Mich. Comp. Laws § 770.3a(3).

For all other types of appellate issues, no matter how meritorious or complex, the statute flatly forbids the judge from appointing appellate counsel. Therefore, an indigent must litigate *pro se* all other potentially meritorious appellate claims, including such arguments as: (1) the sentences should have been concurrent instead of consecutive, *see, e.g. People v. Hunter*, 507 N.W.2d 768 (Mich. Ct. App. 1993); (2) the judge failed to award proper jail credit, *see, e.g., People v. Resler*, 532 N.W.2d 907 (Mich. Ct. App. 1995); (3) the prosecutor or judge breached a plea and/or sentencing agreement, *see, e.g., People v. Nixton*, 454 N.W.2d 160 (Mich. Ct. App. 1990); (4) the plea bargain was illusory, *see, e.g., People v. Graves*, 523 N.W.2d 876 (Mich. Ct. App. 1994); (5) the judge erred in ordering restitution that the defendant cannot pay, *see, e.g., People v. Orweller*, 494 N.W.2d 753 (Mich. Ct. App. 1992); or (6) the convictions or sentences violate the Double Jeopardy Clause, *see, e.g., People v. Artman*, 553 N.W.2d 673 (Mich. Ct. App. 1998).

Many of the indigents unable to file their own appeals have meritorious grounds for appeal and are therefore denied any meaningful chance of obtaining the relief to which they would be entitled. *See* Matuszak, *supra*, at 443 (discussing studies showing twelve percent to forty-seven percent of Michigan guilty plea appeals resulted in relief to defendants). By contrast, a Michigan plea defendant who can afford an attorney will always be able to obtain meaningful appellate review of such errors.

In many cases, the indigent defendant will be completely unaware of meritorious grounds for appeal because trial counsel will have overlooked the error. *See Coppedge v. United States*, 369 U.S. 438, 449-50 (1962) (recognizing that indigent appellants often suffer disadvantages at the trial court level because of their poverty). Even if trial counsel spotted the error, a typical indigent defendant cannot possibly be expected to know which of his trial counsel's objections, if any, merit appellate review. *See Peguero v. United States*, 526 U.S. 23, 30 (1999) (O'Connor, J., concurring) (recognizing, in a guilty plea appeal, that "[t]o require defendants to specify the grounds for their appeal and show that they have some merit would impose a heavy burden on defendants"); *see also Smith*, 528 U.S. at 279 n.10 ("[A]n indigent does, in all cases, have the right to have an [appellate] attorney, zealous for the indigent's interests, evaluate his case and attempt to discern nonfrivolous arguments."). Finally, even if the indigent somehow does correctly identify his meritorious appellate issues, he still must overcome the daunting procedural hurdles necessary to perfect his application for leave to appeal.

The statute guarantees that the vast majority of indigent defendants who wish to appeal from their sentences or pleas receive only a "meaningless ritual," just as Petitioner did, while moneyed defendants receive "a meaningful appeal." *Douglas*, 372 U.S. at 358. The statute therefore violates the Fourteenth Amendment, and the statutory exceptions cannot save it.

C. Petitioner Cannot Be Forced To Waive His Right to Equal Treatment As a Condition of Entering a Plea.

Respondent suggests that Petitioner waived any right he had to appellate counsel when he entered his nolo contendere plea. Br. Opp. 19-20. This argument fails for two reasons.

First, the argument ignores the fact that the purported "waiver" itself violates the Fourteenth Amendment because it applies only to indigents such as Petitioner. The statute does not require a moneyed criminal defendant to give up his or her constitutional right to the assistance of appellate counsel by pleading guilty or nolo contendere. Only the poor lose their right to a meaningful appeal.

As this Court has long recognized, a criminal defendant usually receives substantial benefits in exchange for entering a guilty or nolo contendere plea. *See, e.g., Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). If the Respondent's waiver argument were upheld, however, an indigent defendant could obtain these substantial benefits only by losing any opportunity for meaningful review of any errors the judge, the prosecutor, or defense counsel might commit at sentencing, while a moneyed defendant would not be required to give up meaningful appellate review of such sentencing errors.

Michigan could not constitutionally enforce a statute that would require only black and female defendants to give up their right to appellate counsel in order to receive the benefits of a guilty or nolo contendere plea because such a discriminatory "waiver" requirement would plainly violate the Fourteenth Amendment. For the same reason, it cannot constitutionally require indigents, and only

indigents, to give up their right to the assistance of appellate counsel in order to obtain the benefits of a guilty or nolo contendere plea because the Fourteenth Amendment also protects indigents from discrimination in the criminal justice system. As the Court explained in *Douglas*:

> In *Griffin v. Illinois*, [351 U.S. 12 (1956)], we held that a State may not grant appellate review in such a way as to discriminate against some convicted defendants on account of their poverty. [In *Griffin*], the right to a free transcript on appeal was in issue. Here the issue is whether or not an indigent shall be denied the assistance of counsel on appeal. In either case the evil is the same: discrimination against the indigent. For there can be no equal justice where the kind of an appeal a man enjoys "depends on the amount of money he has."

Douglas, 372 U.S. at 355 (quoting *Griffin*, 351 U.S. at 19).

If Respondent's argument were accepted, Michigan could also presumably require indigents who wish to plead guilty or nolo contendere to waive their right to free transcripts (guaranteed by *Griffin)* and require them to pay the appellate filing fees. *See Burns v. Ohio*, 360 U.S. 252, 257-58 (1959) (holding Fourteenth Amendment prohibits State from requiring indigents to pay appellate filing fees). That is, Michigan could make it effectively impossible for indigents to appeal, while fully preserving the right of moneyed defendants to appeal.

But that is exactly what the purported "waiver" of appellate counsel does. As Petitioner's experience proves, an indigent appellant forced to proceed without the assistance of appellate counsel, like the indigent forced to proceed without transcripts or the indigent whose appeal

can proceed only upon payment of filing fees, "has only the right to a meaningless ritual, while the rich man has a meaningful appeal." *Douglas,* 372 U.S. at 358.

Respondent's argument therefore proves too much. Because it requires only the poor to give up their right to a meaningful appeal from any errors that might arise after the "waiver" in order to receive the benefits of a plea bargain, while moneyed defendants receive those same benefits and waive nothing at all, the supposed "waiver" is itself unconstitutional.

A second reason Respondent's argument fails is that Petitioner did not, in fact, "waive" his constitutional right to appellate counsel. Contrary to Respondent's claim that "Petitioner Halbert was fully informed of the consequences of his pleas, including the fact that he was giving up the right to appointed counsel on appeal," Br. Opp. 19-20, Petitioner was never informed of any such thing before entering his plea.

At Petitioner's plea hearing, the judge specifically advised Petitioner that by entering a plea he was giving up various rights, including the right to a jury or non-jury trial, the right to be presumed innocent, the right to have his guilt proven beyond a reasonable doubt, the right to confront the witnesses against him, the right to compulsory process, the right to remain silent or to testify at trial, and the right to have an automatic appeal. J.A. 19-22. The judge then continued:

> THE COURT: You understand if I accept your plea and you are financially unable to retain a lawyer to represent you on appeal, the Court must appoint an attorney for you if the sentence

> I impose exceeds the sentencing guidelines or you seek leave to appeal a conditional plea or the prosecutor seeks leave to appeal or the Court of Appeals or Supreme Court grants you leave to appeal. Under those conditions I must appoint an attorney, do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Further, if you are financially unable to retain a lawyer to represent you on appeal, the Court may appoint an attorney for you if you allege an improper scoring of the sentencing guidelines, you object to the scoring at the time of the sentencing and the sentence I impose exceeds the sentencing guidelines as you allege it should be scored. Under those conditions I may appoint an attorney, do you understand that?
>
> THE DEFENDANT: Yes, sir.

J.A. 22-23. The judge thus listed some circumstances under which he would or might appoint appellate counsel, but the judge never told Petitioner that he would *not* receive the assistance of appellate counsel otherwise. Nor, for that matter, was Petitioner ever asked to waive his right to appellate counsel to assist him in all circumstances other than those articulated by the judge.

Thus, even if Michigan could constitutionally require the poor, and only the poor, to waive their right to a meaningful appeal as a condition of entering a plea, Petitioner's plea proceeding fell far short of the "intentional relinquishment or abandonment of a known right or privilege" necessary to create an effective waiver of a constitutional right. *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). Indeed, Petitioner correctly believed he had not

relinquished his right to the assistance of appellate counsel, as he filed two requests for appellate counsel just two days after his sentencing. J.A. 47-50, 54-57.

In short, Michigan could not constitutionally require the poor, and only the poor, to give up the right to a meaningful appeal in order to receive the benefits of a plea, and Petitioner did not do so in any event.

II. Petitioner Is Entitled to a New Direct Appeal With the Assistance of Appellate Counsel So That He May Develop the Record Necessary To Support His Appellate Claims, Including Ineffective Assistance of Trial Counsel.

In the second issue in his petition, Petitioner once again raised the ineffective assistance of counsel claim he had tried to raise in the Michigan Court of Appeals. Pet. 15-21. As discussed above, Petitioner does have a strong ineffective assistance claim since his attorney failed to object to the scoring of several sentencing guidelines variables, including one Respondent concedes may have been misscored. In his argument to this Court, however, Petitioner recognized that he had been unable to create the record necessary to support that claim solely because he had been denied the assistance of appellate counsel. Pet. 20-21.

Given the existing record, this Court cannot conclusively determine whether Petitioner received ineffective assistance of trial counsel, just as the Michigan Court of Appeals could not make such a determination without providing appellate counsel to Petitioner. *See, e.g., People v. Mitchell*, 560 N.W.2d 600, 612 (Mich. 1997) (requiring defendant presenting ineffective assistance claim on direct

appeal to hold evidentiary hearing at which trial counsel is "necessary witness"). If Petitioner had funds, he would have been able to hire an appellate attorney who would have created the record necessary for meaningful review of his ineffective assistance claim, as well as any other colorable claims that attorney may have discovered.

Therefore, the proper remedy is for this Court to vacate the Michigan Court of Appeals' order denying Petitioner's application for leave to appeal. The Michigan Court of Appeals should be directed to order the trial court to appoint appellate counsel for Petitioner and to allow Petitioner, with the assistance of appellate counsel, to file a new application for leave to appeal after appellate counsel has had an opportunity to create the evidentiary record necessary for consideration of the ineffective assistance claim. *See Penson v. Ohio*, 475 U.S. 75, 88-89 (1988) (holding denial of appellate counsel requires automatic relief without showing of prejudice).

CONCLUSION

The judgment of the Michigan Court of Appeals denying Petitioner's application for leave to appeal should be vacated, and the Michigan Court of Appeals should be ordered to direct the trial court to appoint appellate counsel for Petitioner and to permit Petitioner, with the assistance of appellate counsel, to file a new application for leave to appeal after appellate counsel has had an opportunity to create the evidentiary record necessary for consideration of Petitioner's claims.

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In the
Supreme Court of the
United States

ANTONIO DWAYNE HALBERT,

Petitioner,

v

STATE OF MICHIGAN

Respondent.

On Writ of Certiorari to the
10th Judicial Circuit Court, Saginaw County, Michigan

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QUESTIONS PRESENTED

I. The Fourteenth Amendment guarantees an indigent defendant the right to appointed counsel for an appeal of right but does not require it for a second, discretionary appeal. In Michigan, when a defendant pleads guilty but then decides to challenge the plea or sentence, the State requires trial counsel for an indigent defendant to raise these claims in the trial court for the first review. For the second, discretionary review, Michigan does not guarantee counsel but a defendant convicted on a plea will have the record, including free transcripts, trial counsel's arguments, and the trial court's decision, to assist in preparing the application for leave to appeal to the Court of Appeals. Does the Michigan system of review of guilty-plea convictions violate the Fourteenth Amendment?

II. A defendant may waive a constitutionally-protected right if he does so voluntarily, knowingly, intelligently, and with sufficient awareness of the relevant circumstances. Here, Petitioner waived any claim to appointed appellate counsel by agreeing to plead guilty after being told that he might be appointed counsel in certain limited circumstances. Where defendant is represented by counsel at the guilty-plea proceeding, does the waiver of appointed counsel to assist in seeking discretionary appellate review violate the Fourteenth Amendment?

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COURT RULES INVOLVED

In addition to the constitutional provision and statute quoted at Petitioner's brief, pp 1-4, the following Michigan Court Rules (MCR) are pertinent:

MCR 6.500(H):

(H) Scope of Trial Lawyer's Responsibilities. The responsibilities of the trial lawyer appointed to represent the defendant include

(1) representing the defendant in all trial court proceedings including sentencing and proceedings leading to possible revocation of youthful trainee status,

(2) filing of interlocutory appeals the lawyer deems appropriate,

(3) responding to any preconviction appeals by the prosecutor, and

(4) unless an appellate lawyer has been appointed, filing of postconviction motions the lawyer deems appropriate, including motions for new trial, for a directed verdict of acquittal, to withdraw plea, or for resentencing.

MCR 6.302(B)(5), (6):

(B) An Understanding Plea. Speaking directly to the defendant, the court must advise the defendant and determine that the defendant understands:

* * *

(5) any appeal from the conviction and sentence pursuant to the plea will be by application for leave to appeal and not by right;

(6) if the plea is accepted, the defendant is not entitled to have counsel appointed at public expense to assist in filing an application for leave to appeal or to assist with other postconviction remedies unless the defendant is financially unable to retain counsel and

(a) the defendant's sentence exceeds the guidelines,

(b) the plea is a conditional plea under MCR 6.301(C)(2),

(c) the prosecuting attorney seeks leave to appeal, or

(d) the Court of Appeals or the Supreme Court grants leave to appeal.

STATEMENT OF THE CASE

A. Historical Background to the Michigan System

Before 1994, the Michigan Constitution provided defendants an appeal of right from all criminal convictions without distinguishing between convictions by jury trials and guilty pleas. Mich. Const. 1963, art 1, §20. Under Michigan case law, the courts then held that an indigent defendant had the right to the appointment of appellate counsel for an appeal of right. *People v. Gazaway,* 35 Mich. App. 39, 40-41; 192 N.W.2d 122 (1971), citing *Douglas v. California,* 372 U.S. 353 (1963).

In 1994, the people of Michigan adopted a proposal to amend the Constitution, known as "Proposal B," that eliminated appeals by right in plea-based convictions, and instead required a defendant to file an application for leave. As amended in Const. 1963, art 1, §20, the Michigan Constitution now states that an accused is entitled "to have an appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court[.]"

In *People v. Bulger,* 462 Mich. 495, 504; 614 N.W.2d 103 (2000), *cert. den.*, 531 U.S. 994 (2000), the Michigan Supreme Court explained that one of the primary reasons for the adoption of the 1994 amendment was to alleviate the court's backlog:

> Eliminating appeals as a matter of right from plea-based convictions was suggested as a way to help control the case load of the Michigan Court of Appeals. By 1992, the Court of Appeals had a backlog of more than *4,000 cases awaiting decision*, and plea-based appeals constituted approximately *thirty percent of all appeals facing the Michigan*

> *Court of Appeals*. Eliminating appeals of right from plea-based convictions was one method proposed to reduce a crushing burden on our appellate courts. [Citations and internal quotation marks omitted; emphasis added.]

By eliminating the appeal by right, the amendment thereby might reduce the number of cases filed from plea-based convictions.

Before the passage of the 1994 amendment, appeals from plea-based convictions in Michigan comprised a substantial portion of the total cases filed in the Michigan Court of Appeals. In 1992, there were a total of 13,300 filings for all cases, including appeals by right and by application, both civil and criminal, in the Michigan Court of Appeals.[1] Of these cases, approximately 4000 of the filings each year were appeals from guilty-plea cases, comprising two-thirds of all criminal appellate cases.[2] At the time, it took a case approximately two and a half years to reach disposition.[3]

One of the other considerations at play in eliminating a defendant's appeal by right was the futility of these appeals that were generally with appointed counsel. See House Legislative Analysis, Ballot Proposal B, First Analysis, filed October 14, 1994, p 4. Consistent with this, the Chief Judge of the Michigan Court of Appeals at the time, Judge William Murphy, reported that only 0.74 percent of guilty-plea cases tracked in 1992 were reversed (12 out of 1,629) and that 9.5

[1] See "'Structural Deficit' as it Relates to the Crisis in the Michigan Court of Appeals," 7 Michigan Bar Journal 906, 910 (September, 1993).

[2] See House Legislative Analysis, Ballot Proposal B, First Analysis, filed October 14, 1994, p 2.

[3] See Citizens Research Council of Michigan, "Statewide Ballot Proposals," No. 1033, October 1994, p 1.

percent were remanded for further sentencing actions. *Michigan Lawyers Weekly*, Vol. 7, No. 15, February 22, 1993, p 20.[4]

Once the 1994 amendment made plea-based appeals a matter of discretionary application for leave, the Michigan Supreme Court revised the court rules to authorize trial courts to "liberally grant" the appointment of counsel for indigent defendants who filed an application within 42 days of sentencing. *Bulger, supra,* 462 Mich. at 501. This court rule was challenged in *Bulger*, and the Michigan Supreme Court provided a lengthy analysis affirming the constitutionality of the system. See *Bulger, supra.*

In 2000, while *Bulger* was pending, the Legislature passed MCL 770.3a, which provides the current system of appointment of appellate counsel for defendants who plead guilty and then decide to challenge either the conviction or the

[4] In his brief, Petitioner cites the figures that between 12 and 47 percent of defendants received relief in these plea-based appeals and he cites a law student note, "Limiting Michigan's Guilty and Nolo Contendere Plea Appeals," 73 U. Det. Mercy L. Rev. 431, 443 (1996). Petitioner's brief, p 42. The note obtained these figures, however, from the October 14, 1994 legislative analysis, which merely reported claims from the State Appellate Assigned Counsel System ("12 to 13 percent") and from the State Appellate Defender's Office (SADO) ("about 47 percent"). See 73 U. Det. Mercy L. Rev. at 443, n 113, citing House Legislative Analysis at 3. Significantly, this analysis also reported that "the [C]ourt of [A]ppeals estimates that the relief rate on guilty plea cases that actually come before it is relatively low, perhaps three or four percent." *Id.* at 4. It explained that "relief" did not necessarily mean that the defendant would serve a lesser sentence:

> Further, that relief may take the form of requiring the trial court to resentence the defendant, with variable results; sometimes the sentence is the same, sometimes it is longer, sometimes the defendant's sentence is reduced by only a few days. [*Id.*]

Respondent submits that the Michigan Court of Appeals is the proper source for information in this area, not the defender's office.

sentence. This statute took effect on April 1, 2000 and is the statute that is at issue in this case.[5]

B. The Michigan Review of Plea-Based Convictions

1. The Defendant's Plea and the First Review

Michigan has a two-tier appellate court system, consisting of the intermediate Michigan Court of Appeals and the Michigan Supreme Court. All appeals to the Michigan Supreme Court are by application. See MCL 770.3(6). In criminal cases, the Michigan Court of Appeals reviews appeals by right from all final judgments from the circuit court ("the trial court"), except in cases in which the conviction is based on a plea of guilty or nolo contendere, which are by leave. MCR 7.203(A)(1)(b). All appeals from guilty-plea cases are by application. *Bulger, supra,* 462 Mich. at 505.

In the plea proceeding, the trial court is required by the Michigan court rules to inform the defendant of all of the rights that the defendant is waiving by his plea. MCR 6.302(B)(3). In addition to the standard rights, the court is also obligated to inform the defendant that the plea waives any right to have the Court of Appeals hear any appeal from the conviction and sentence, but rather, that any appeal would be by application. MCR 6.302(B)(5). The court is also required to inform the defendant that he will only have the right to the assistance of counsel on appeal in certain circumstances, listed in MCR 6.302(B)(6)(a), (b), (c), and (d).

Before sentencing, a defendant has a right to move to withdraw a plea, and the trial court "in the interest of justice may permit an accepted plea to be withdrawn[.]" MCR 6.310(B). After sentencing, however, the court rules provide

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[5] The Michigan Supreme Court determined that the statute was constitutional relying on the *Bulger* decision. *People v. Harris,* 470 Mich. 882; 681 N.W.2d 653 (2004), pet. for cert. pending, No. 04-6572.

that the trial court may only set aside the plea and sentence where it "determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside[.]" MCR 6.311(B).

Where a defendant wishes to challenge the validity of a plea after sentencing, the court rules require that the defendant first raise this issue before the trial court. See MCR 6.311(C). Thus, where a defendant is challenging the validity of the adjudication of guilt, the first review of the conviction's validity must occur in the trial court.

For this first review, the Michigan system requires trial counsel to serve as the defendant's counsel for raising this issue the first time where appellate counsel has not been assigned. See MCR 6.005(H)(4).

Similarly, the Michigan system instructs a defendant to first raise issues regarding sentencing before the trial court. If the defendant believes that the trial court has wrongly scored one of the variables in calculating the guidelines or relied on inaccurate information, the defendant generally must raise this issue before the sentencing court. See MCR 6.429(C). Like motions to withdraw a plea, a defendant's trial counsel has the responsibility to object at sentencing to an improper scoring of the guidelines and, where appellate counsel has not been assigned, to bring a post-conviction motion for resentencing for any errors that he failed to raise at sentencing. MCR 6.005(H)(4).

Under the court rules, a defendant may file a motion to withdraw his plea within the time for filing an application for leave, which is one year. See MCR 6.311(A); MCR 7.205(F)(4). The rules provide the same time framework – one year – for a motion for resentencing. MCR 6.429(B)(3).

2. The Second Review and the Application

The Michigan Supreme Court has expressly stated that the application for leave in the Court of Appeals is a *discretionary* one. *Bulger, supra,* 462 Mich. at 499. The requirements for filing an application for leave to appeal to the Michigan Court of Appeals are set forth in MCR 7.205.

By statute, the Legislature has defined the circumstances in which the State of Michigan shall appoint appellate counsel for an indigent defendant who pleads guilty, nolo contendere, or guilty but mentally ill and wishes to bring an application for leave to the Michigan Court of Appeals.[6] Under MCL 770.3a, there are four circumstances in which a defendant has the right to the appointment of appellate counsel:

(1) the prosecuting attorney seeks leave;

(2) the defendant's sentence exceeds the upper limit of the minimum sentence range of the guidelines;

(3) there is a grant of the defendant's application for leave;

(4) the defendant seeks to appeal a conditional plea under the Michigan Court Rule 6.301(C)(2).[7]

This provision corresponds to the court rules at MCR 6.302(B)(6). The statute also provides the trial court the discretion to appoint counsel in another situation – where the defendant alleges an error in an offense variable or prior record

[6] MCL 770.3a applies to appeals from convictions based on pleas of guilty, guilty but mentally ill, and nolo contendere. For ease of reference, this brief will use the term "guilty plea" to apply to all three types of convictions.

[7] The court and the prosecutor must agree to a conditional plea under MCR 6.301(C)(2) for pretrial rulings; such a plea allows the defendant to withdraw the plea if the trial court's decision is overturned on appeal.

variable, counsel objected, and the sentence would be an upward departure if the defendant was right on how to score the contested variable. MCL 770.3a(3).

Outside of these circumstances, the statute provides that a defendant who pleads guilty "shall not have appellate counsel appointed for review of the defendant's conviction or sentence." MCL 770.3a(1).

Where an indigent defendant seeks to have the Michigan Court of Appeals review his conviction or sentence, Michigan law requires the trial court to provide the defendant with two forms developed by the State Court Administrative Office, MCL 770.3a(4): (1) an advice of right to appeal form, again outlining the circumstances in which the defendant has the right to appointed counsel; and (2) the application instructions, which include two pages of common-sense directions on how to fill out the application, and the application itself, which runs four pages.[8] The application provides, in a practical way, all of the steps that a defendant needs to follow to file an application for leave.

In bringing an application for leave to the Michigan Court of Appeals, the court rules provide that a defendant must file within 21 days of the trial court's final order – the judgment of sentence – but a defendant may file up to one year after the final order as a delayed application with an explanation of the reasons for the delay. MCR 7.205(A) and (F). The current form assumes the application will be a delayed application and begins with the statement that the application is filed more than

[8] Both of these forms may be found on the Michigan court website at the following address: http://courts.michigan.gov/scao/courtforms/appeals/appendex.htm ("Advice Concerning Right to Appeal After Plea of Guilty/ Nolo Contendere" and "Application for Leave to Appeal After Sentencing on Plea of Guilty or Nolo Contendere"). These forms were both revised in 2003 and 2004 after Petitioner's case. The corresponding forms used for Petitioner's case were earlier versions. See J.A. 46-50, 53-57, 66-71.

21 days from the judgment of sentence, followed by a list of possible standard explanations for the delay for the defendant to check off.[9]

For a timely filing of an application, the rules require that the defendant attach a copy of the plea transcript and the sentencing transcript, MCR 7.205(B)(4)(d), but if these have not yet been prepared, the rules allow the defendant to file a copy of the certificate of the court reporter. MCR 7.205(B)(4)(g) and MCR 7.204(C)(2). The application instruction form alleviates the need for the defendant to wade through the court rules – the form explains that the defendant must file the plea and sentencing transcripts but "[i]f the transcripts are not available when you file your application, substitute it with the request letter to the circuit court."[10] There is no filing fee for an indigent's application for leave, but the indigent defendant is responsible for filing an affidavit of indigency.[11]

C. The Cases Against Petitioner Halbert

Petitioner was charged in Saginaw County, Michigan with three counts of second-degree criminal sexual conduct against three different victims, between April and June 2000. J.A. 8-11, Case No. 00-19193 (the "first case"). In the first and third counts, Petitioner was charged with sexually touching a girl younger than 13 years old: one victim was 10 years old and the other was only 6 years old. MCL 750.520c(1)(a) (victim

[9] The standard reasons listed in the application included "I did not know until recently that I could appeal the decision," "I could not afford the postage and copying costs to file this application," and "I needed to get help to complete this application." "Application for Leave to Appeal," p 1. The Petitioner's form is identical on this point. See J.A. 66-67.

[10] "Application for Leave," p 2 of instructions.

[11] *Id.*

under 13 years old). In the second count, defendant was charged with sexually touching his stepdaughter, who was 13 years old, when she was a member of his household. MCL 750.520c(1)(b)(i) (victim between 13 and 16 and member of same household). When Petitioner was released on bond in December 2000, the court imposed as a condition of bond that he not reside at the same residence as his stepdaughter.

In July 2001, seven months later, Petitioner again sexually touched his stepdaughter and was charged in Saginaw County in a second case with one count of second-degree criminal sexual conduct. MCL 750.520c(1)(b)(i). J.A. 14-16, Case No. 01-20597 (the "second case").

Petitioner remained in custody and was represented by retained counsel in the trial court proceedings on both cases.

On November 7, 2001, Petitioner entered pleas of nolo contendere to Count I of the first case and to the only count in the second case.[12] In exchange, the prosecutor agreed to dismiss the second and third counts of the first case and recommended that Petitioner be sentenced within the Michigan Sentencing Guidelines. The prosecutor also requested that the court impose consecutive sentencing.[13] Petitioner's trial counsel noted for the record that he had discussed the plea agreement with Petitioner and Petitioner understood it. Trial counsel also requested concurrent sentencing. J.A. 17-19.

As required by MCR 6.302, the trial court asked Petitioner a series of questions to ensure that the pleas were

[12] Petitioner entered pleas of nolo contendere rather than guilty because of the potential for civil liability in a pending neglect petition involving his stepdaughter. J.A. 18.

[13] Because the second offense was committed while the first charges were pending, the trial court had discretion to impose consecutive sentencing. MCL 768.7b(2).

"understanding, voluntary, and accurate." The court informed Petitioner of the list of rights he would be giving up by pleading instead of going to trial, including the right to appeal and the right to appointed appellate counsel:

> THE COURT: You understand if I accept your plea you are giving up or waiving any claim of an appeal as of right.
>
> THE DEFENDANT: Yes, sir.
>
> * * *
>
> THE COURT: You understand if I accept your plea and you are financially unable to retain a lawyer to represent you on appeal, the Court must appoint an attorney for you if the sentence I impose exceeds the sentencing guidelines or you seek leave to appeal a conditional plea or the prosecutor seeks leave to appeal or the Court of Appeals or Supreme Court grants you leave to appeal. *Under those conditions I must appoint an attorney, do you understand that*?
>
> THE DEFENDANT: *Yes, sir.*
>
> THE COURT: Further, if you are financially unable to retain a lawyer to represent you on appeal, the Court may appoint an attorney for you if you allege an improper scoring of the sentencing guidelines, you object to the scoring at the time of the sentencing and the sentence I impose exceeds the sentencing guidelines as you allege it should be scored. *Under those conditions I may appoint an attorney for you, do you understand that?*

> THE DEFENDANT: *Yes, sir.* [J.A. 22-23 (emphasis added).]

The court then referred the matter to the Department of Corrections for a presentencing investigation.

In Michigan, for each case, the Department of Corrections prepares a sentence investigation report. This report includes a recommended calculation of the guidelines for each case. J.A. 27-28, 29-30. Under Michigan's sentencing scheme, the maximum sentences are set by statute and the minimum sentence ranges are determined by using the sentencing guidelines.[14] Consequently, it is an indeterminate sentencing system. See MCL 769.8. The trial court is required to sentence a defendant within the guideline range for the minimum sentence, but may "depart" from the guidelines if there are substantial and compelling reasons for doing so. MCL 769.34(3).

Here, the two cases of criminal sexual conduct were subject to a maximum sentence of 15 years set by statute. See MCL 769.9(2). The guidelines governing the minimum sentence consider both a defendant's past criminal record, which is measured by prior offense variables (PRV), and the gravity of the offense, which is determined by the offense variables (OV). Each variable is totaled and then compared to a grid based on the crime group (here, crimes against a person) and crime classes (here, class C). Michigan Sentencing Guidelines Manual, 2001 Edition, pp 3-5; App. to Respondent's Brief in Opp. to Pet., 32b-34b.

At sentencing, on December 10, 2001, Petitioner's retained counsel acknowledged that he and Petitioner had discussed the

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[14] The Michigan sentencing guidelines are governed by statute, MCL 777.1 *et seq*. The Michigan Supreme Court has promulgated a guideline manual, the current version of which can be found on the Michigan court website: http://courts.michigan.gov/mji/resources/sentencing-guidelines/sg.htm.

presentencing report the previous week. J.A. 32. Neither the defense nor the prosecution objected to the scoring of the guidelines, although Petitioner's trial counsel asked the court to sentence Petitioner concurrently. J.A. 33. The trial court decided to sentence Petitioner within the guidelines on each offense – at the highest end – and made the sentences consecutive: Petitioner was sentenced to 2-to-15 years in prison on the first case to run consecutive with his 57-months-to-15 years on the second case. J.A. 35. Under Michigan Truth-In-Sentencing law, Petitioner will not be eligible for parole release until he has served the combined minimum terms of 81 months. See MCL 800.34(5).

Consistent with the Michigan court rules under MCR 6.425(E)(2)(d), Petitioner was given a form entitled "Notice of Rights After Sentencing (after Plea of Guilty/Nolo Contendere) and Request for Appointment of Attorney" for each of his cases. On December 12, 2001, he signed and filed these forms requesting appointment of an appellate attorney for each case. J.A. 46-50, 53-57. Petitioner also signed the receipt of notice of appeal rights and form for the application for leave to appeal. On December 21, 2001, in separate orders, the trial court denied his request for the appointment of an attorney. J.A. 44-45, 51-52.

On December 17, 2001, according to the docket entries, defendant moved to withdraw his plea. J.A. 5. On December 18, 2001, the trial court denied this motion, reasoning that "there was no agreement as to if the sentences were to run concurrent or consecutive." J.A. 43.

On September 11, 2002, Petitioner filed a motion requesting appointment of counsel, an evidentiary hearing, and resentencing on both cases. J.A. 60-63. On October 25, 2002, the trial court again denied a motion for appointed appellate counsel, citing *Bulger, supra.* J.A. 64-65.

On November 5, 2002, Petitioner filed a pro se application for leave to appeal to the Michigan Court of Appeals on a form provided by the State Court Administrative Office. This application challenged the scoring of the sentencing guidelines and alleged ineffective assistance of trial counsel regarding the guidelines. J.A. 66-71.[15] On January 13, 2003, the Michigan Court of Appeals denied Petitioner's delayed pro se application for leave to appeal "for lack of merit in the grounds presented." J.A. 72.

On February 25, 2003, Petitioner filed a pro se application for leave to appeal to the Michigan Supreme Court on a form provided by Prison Legal Services of Michigan. J.A. 73-83. This application challenged the scoring of the sentencing guidelines, alleged ineffective assistance of trial counsel on the guideline scoring, and raised the issue of the trial court's failure to appoint appellate counsel. On September 19, 2003, the Michigan Supreme Court denied Petitioner's pro se application for leave to appeal. J.A. 84-85.

On November 20, 2003, Petitioner filed a pro se petition seeking a writ of certiorari that was granted on January 7, 2005. On February 14, 2005, Petitioner filed his brief with the assistance of an appellate counsel appointed by this Court.

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[15] The application included two explanatory pages on how to fill out the application. These pages are not appended – they would not have been filed with the application. The Supreme Court Administrative Office's version of the form used here is virtually identical to the one currently available on its website. See n. 9, *supra.*

SUMMARY OF ARGUMENT

The Michigan system for review of guilty-plea convictions satisfies constitutional requirements. In the Michigan system, the first review of a defendant's plea-based conviction occurs in the trial court, which must ensure the fairness and validity of the plea and sentence. The defendant is guaranteed the assistance of counsel for this first review. Michigan then limits a defendant's right to a second review, requiring the defendant to seek leave in the Michigan Court of Appeals by filing an application. This is a discretionary matter for the Court of Appeals – there is no right to have the matter examined on the merits.

The distinction Michigan law makes between appeals from guilty-plea convictions and from convictions from trial is based on reasoned distinctions inherent in guilty-plea convictions – these distinctions recognize that ordinarily the number and complexity of the possible claims of error are limited and that a defendant has already had one review when challenging the plea or sentence. Moreover, the requirement that a defendant must raise plea and sentencing issues in the trial court also ensures that an indigent defendant will have an adequate record from which to present his claims adequately in seeking a second review. The system is fair.

Petitioner's case confirms the fairness of the Michigan system. With the assistance of his retained attorney, Petitioner Halbert pleaded nolo contendere in two different criminal sexual conduct cases. J.A. 18-25. After the trial court imposed consecutive sentencing, defendant sought to withdraw his plea, apparently claiming that he was promised concurrent sentencing. In response, the court noted that there was no agreement to have the sentences run concurrently. J.A. 43. After being denied the appointment of appellate counsel, Petitioner then sought the further assistance of trial counsel as envisioned by the court rules. The trial counsel declined to

assist because he knew that there was no merit to the claim that Petitioner expected to have concurrent sentences.

The Michigan system is also constitutional because Petitioner validly waived any claim to the appointment of appellate counsel at the plea. Regardless whether there is a right to appellate counsel in this circumstance, Petitioner waived this claim when he pleaded guilty. This Court has recognized the ability of a defendant to waive his constitutional rights – including the right to counsel – as long as the waiver was knowing, intelligent, and done with sufficient awareness of the relevant circumstances. Petitioner did so here.

In fact, this case compares favorably to the facts of *Iowa v. Tovar*, 541 U.S. 77 (2004), in which this Court affirmed the validity of a waiver of the right to counsel at an arraignment even though the defendant had not previously conferred with an attorney. Here, with the assistance of a retained attorney, Petitioner pleaded guilty and waived any claim to the assistance of appellate counsel in bringing an application if he later wanted to challenge the validity of the conviction or sentence. The right to have legal assistance where the possible defenses were entirely open in *Tovar* was of greater value to the defendant there than it was for Petitioner here, who waived his claim for possible later appellate assistance only after his retained attorney had negotiated a plea agreement with a sentencing agreement.

ARGUMENT

I. The Michigan system of review of plea-based convictions is fair and comports with equal protection and due process because it gives indigents meaningful access to appellate review.

A. In Michigan, an indigent defendant who pleads guilty has the right to the assistance of counsel in bringing a challenge in the first review of the conviction.

In Michigan, as in all states, the vast majority of criminal cases are resolved by plea. See Michigan Supreme Court 2003 Annual Report, Circuit Court Statistical Supplement at 3 (94%).[16] The State of Michigan limits the right to bring an appeal from these convictions and limits the right to the appointment of counsel to assist in filing these applications for discretionary review based on the nature of Michigan's review of convictions from plea proceedings and the kinds of challenges that can be brought.

1. The plea and the assistance of counsel.

Under the Michigan system of review, an indigent defendant charged with a crime has a right to the appointment of counsel to assist in his defense. MCR 6.005(D). This right is also required under the Fourteenth and Sixth Amendments. *Gideon v. Wainwright,* 372 U.S. 335 (1963). A defendant also has the right to plead guilty to the charged offenses. See MCR 6.301(A).[17]

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[16] This report may be found on the Michigan court website: http://courts.michigan.gov/scao/resources/publications/statistics/2003/circuitcaseloadreport2003.pdf.

[17] Under Michigan law, a plea of nolo contendere operates the same as guilty plea except on the method by which the factual basis is established. *People v. New*, 427 Mich. 482, 493; 398 N.W.2d 358 (1986).

A defendant's plea of guilty to the charged offense operates as a dramatic change in the nature of the proceedings against him. The plea is the conviction itself. *Boykin v. Alabama,* 395 U.S. 238, 242 (1969). See also *Kercheval v. United States,* 274 U.S. 220, 223 (1927). All that is left is for the trial court to do is to pass judgment and sentence. *Boykin, supra,* 395 U.S. at 242. Convictions by guilty pleas are advantageous to both defendants and the government, and are a major aspect of the criminal justice system. *Brady v. United States*, 397 U.S. 742, 752 (1970).

In pleading guilty, the defendant substantially reduces the number of challenges that he can make to his conviction. In *Bulger, supra,* 462 Mich. at 517, n 7, the Michigan Supreme Court listed a number of different claims under Michigan law that are waived by a plea of guilty, including the following:

- claims of error from the preliminary examination including sufficiency for a bind over;
- compulsory incrimination claims;
- nonjurisdiction evidentiary issues; and
- claims regarding the ability of the prosecutor to prove the case.

Convictions from guilty pleas in Michigan are, in a very real sense, "the final step in the adjudication of guilt or innocence of the individual." *Evitts v. Lucey*, 469 U.S. 387, 404 (1985).

2. The first review of plea and sentence.

Under Michigan law, all of the claims that the plea was not understanding, voluntary, or accurate must be raised for the first time in a motion to set aside the plea at the trial court

before they can be raised in an application in the Court of Appeals. MCR 6.311(C):

> A defendant convicted on the basis of a plea may not raise on appeal any claim of noncompliance with the requirements of the rules in this subchapter or any other claim that this plea was not an understanding, voluntary, or accurate one, unless the defendant has moved to withdraw the plea in the trial court, raising as a basis for withdrawal the claim sought to be raised on appeal.

In other words, where a defendant challenges the validity of the adjudication of guilt, the first review of the conviction's validity must occur before the trial court. The Michigan Court of Appeals has generally been strict in enforcing this rule. See, e.g., *People v. Beasley,* 198 Mich. App. 40, 42-43; 497 N.W.2d 200 (1993).[18]

For this first review of the validity of the conviction, the Michigan system requires trial counsel to serve as the defendant's counsel for raising this issue. MCR 6.005(H)(4)

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[18] In *Beasley,* the Michigan Court of Appeals evaluated a claim that defendant's plea was factually inadequate to establish the elements of the crime. It determined that the defendant had "waived" this issue on appeal without evaluating the merits because the defendant did not move to withdraw his plea in the trial court. *Beasley, supra,* 198 Mich. App. at 42-43 ("because defendant failed to move to withdraw his plea in the trial court, this issue is waived on appeal"). See also, e.g., *People v. Kaczorowski,* 190 Mich. App. 165, 172-173; 475 N.W.2d 861, 864-865 (1991).

The Michigan Court of Appeals has recognized exceptions to this general rule, for example, where the trial court "completely fails to inform the defendant on the record of any of the rights enumerated in MCR 6.302," see *People v. Quinn,* 194 Mich. App. 250, 254; 486 N.W.2d 139 (1992), or where the defect is jurisdictional, see *People v. Johnson,* 207 Mich. App. 264, 264; 523 N.W.2d 655 (1994).

provides that the trial counsel is responsible for raising the motion to withdraw a defendant's plea:

> The responsibilities of the trial lawyer appointed to represent the defendant include
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> * * *
>
> (4) unless an appellate lawyer has been appointed, filing of postconviction motions the lawyer deems appropriate, including motions for new trial, for a directed verdict of acquittal, to withdraw plea, or for resentencing.

The Michigan Supreme Court explained the same point that issues related to the validity of the plea must be raised in the trial court and that the trial counsel is responsible for assisting in raising these post-conviction motions:

> Claims of failures to honor plea bargains, coercion or involuntariness of a plea, and lack of mental capacity to enter a plea are all examples of issues that require preservation by a motion to withdraw under MCR 6.311(C). A defendant will accordingly have assistance of appointed trial counsel in identifying and raising those issues worth preserving. MCR 6.005(H)(4). [*Bulger, supra,* 462 Mich. at 518, n. 8.]

Similarly, the Michigan system requires that challenges to the scoring of sentencing guidelines be raised and resolved at sentencing. MCR 6.429(C). This rule provides that sentences within the guidelines must be challenged before the trial court:

> A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon

> in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals. [MCR 6.429(C).][19]

Just as in motions to withdraw pleas, trial counsel has the responsibility to object at sentencing to an improper scoring of the guidelines and, if counsel fails to do so, to move for resentencing for any errors that he failed to raise at sentencing. MCR 6.005(H)(4) (the postconviction motions include "motions . . . for resentencing").

Based on these court rules, the Michigan Supreme Court explained in *Bulger* that the Michigan system places the obligation on trial counsel of raising these issues for their first review in the trial court:

> Thus, our court rules require trial counsel to assist the defendant in organizing and presenting to the trial court any potential appellate issues that warrant preservation. [*Bulger, supra,* 462 Mich. at 518.]

For this reason, it is the responsibility of trial counsel to file any appropriate postconviction motions. *Id.* In effect, Michigan places this essentially review function on trial counsel.

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[19] As an exception to this general rule, the Michigan Supreme Court has allowed review under MCL 769.34(10) where a defendant raises a sentencing issue for the first time on appeal when the guidelines, if scored as the defendant alleged, would make the trial court's sentence a departure. See *People v. Kimble,* 470 Mich. 305, 310; 684 N.W.2d 669, 672 (2004). Otherwise, a sentencing claim on scoring issues is not reviewable unless the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand. *Id.*

Petitioner's case reflects this point. In response to Petitioner's request for assistance to his retained trial counsel, Rod O'Farrell sent Petitioner a letter dated May 21, 2002 in which he explained that he was unable to assist Petitioner because the positions that Petitioner was advancing on the issue of concurrent and consecutive sentences were "contradictory to our discussions and also to the record." Petition, Exhibit H. As this Court noted in *Smith v. Robbins,* 528 U.S. 259, 278 (2000), Petitioner's retained attorney had no obligation to raise a frivolous motion. ("For although, under *Douglas,* indigents generally have a right to counsel on a first appeal as of right, it is equally true that this right does not include the right to bring a frivolous appeal and, concomitantly, does not include the right to counsel for bringing a frivolous appeal").

B. The Michigan system provides counsel for the first review on the merits of a plea and sentence in the trial court, and, for a second, discretionary review, it provides uncounseled indigents with meaningful access to the appellate system that gives the appellate court an adequate basis for its decision whether to grant or deny review under *Douglas* and *Ross*.

As a threshold matter, it is clear there is no constitutional right to an appeal, *McKane v. Durston*, 153 U.S. 684, 687 (1894). Nevertheless, where a State grants a defendant a first appeal as of right on the merits, then the State cannot deny appointing counsel to an indigent defendant. *Douglas v. California*, 372 U.S. 353, 357 (1963). The Michigan system provides an indigent defendant with the assistance of counsel to raise claims that relate to his adjudication of guilt and sentence in the first review in the trial court. This process ensures there will be a sufficient record to enable him meaningful access to a second, discretionary review in the Michigan Court of Appeals in accordance with *Douglas* and

Ross, and to ensure that the appellate court has an adequate basis for its discretionary decision whether to grant or deny leave.

1. *Douglas* does not govern discretionary review.

In the California system under review in *Douglas*, an indigent defendant had an appeal by right but had to ask the court to appoint counsel. The California courts would then determine whether counsel would be "of advantage to the defendant or helpful to the appellate court" and, after this preliminary determination, decide whether to appoint counsel. *Douglas, supra*, 372 U.S. at 355. This Court determined that such a system was both unfair and unequal:

> There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. [*Id.* at 357-358.]

Without the assistance of counsel, this Court concluded "the indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal." *Id.*

The essential element of this Court's holding in *Douglas* was based on the fact that the "preliminary determination" by the California court evaluated the merits of the defendant's appeal:

> If [the indigent defendant can afford the assistance of counsel], the appellate court passes on the merits of his case only after having the full benefit of written

> briefs and oral argument by counsel. If he cannot the appellate court is forced to *prejudge the merits* before it can even determine whether counsel should be provided. [*Douglas, supra*, 372 U.S. at 356 (emphasis added).]

This Court limited its holding to the circumstance where "the merits of the one and only appeal an indigent has of right are decided without the benefit of counsel." *Id.* at 357. Consequently, the *Douglas* opinion does not govern the Michigan appellate system, which only provides a defendant an opportunity to file an application for *discretionary* review by the Michigan Court of Appeals. There is no right to have the merits reviewed in an appeal from a plea-based conviction in Michigan. See section C, *infra*.

In subsequently explaining *Douglas* in *Ross v. Moffitt*, 417 U.S. 600, 608 (1974), this Court repeated the point that the review was of a first appeal in which the merits of defendant's claims were examined – this was an indispensable part of the analysis in *Douglas*. In explaining this point in *Ross*, this Court stated, 417 U.S. at 608:

> The Court [in *Douglas*] noted that under this system an indigent's case was initially reviewed on the merits without the benefit of any organization or argument by counsel. ... The Court noted, however, that its decision *extended only to initial appeals as of right* . . . . [emphasis added]

This Court has never extended this holding in *Douglas* to a discretionary review. The right to counsel on appeal "extends to the first appeal of right, and no further." *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). There is no reason to extend this holding here where Michigan provides indigent defendants meaningful access to the appellate system.

2. *Ross* governs this case.

This Court held in *Ross* that there is no constitutional right to the appointment of counsel for an indigent defendant in a second, discretionary appeal where that defendant has "meaningful access" to the next level of review. *Ross, supra,* 417 U.S. at 615. The fact that a defendant is seeking review is significant to the determination, because no longer is the defendant attempting to defend himself from the prosecution, but now is endeavoring to upset a prior determination of guilt:

> [I]t is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below. *The defendant needs an attorney on appeal not as a shield to protect him against being "haled into court" by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt.* This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all. [*Ross, supra,* 417 U.S. at 610-611 (emphasis added), citing *McKane v. Durston, supra.*]

The Michigan process of review for plea-based convictions has been located in the trial court as the first step. Consequently, where a defendant has pleaded guilty and then decides that his plea was improper, he approaches this first review as a convicted person using his assistance of counsel as a sword, not as a shield.

In *Ross,* this Court explained the nature of the due process claim from *Douglas.* This Court noted that *Douglas* stated that it was unfair to require a defendant to make the initial showing

of the merits of his claim for an ex parte review by the appellate court without the assistance of counsel: "'When an indigent is forced to run this gantlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure.'" *Ross, supra,* 417 U.S. at 609, quoting *Douglas, supra,* 372 U.S. at 357. *Ross* then went on to clarify this point that a process is unfair where the defendant is denied "meaningful access" to the appellate system:

> Unfairness results only if indigents are singled out by the State and *denied meaningful access to the appellate system* because of their poverty. [*Ross, supra,* 417 U.S. at 611 (emphasis added).]

By requiring that the first review occur in the trial court, however, Michigan assures that all the tools necessary for a meaningful application to the Michigan Court of Appeals are available. This Court in *Ross* explained what tools are necessary for an adequate review on appeal:

> At that stage [in bringing an application for leave in the North Carolina Supreme Court] he will have, at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case. These materials, supplemented by whatever submission respondent may make pro se, would appear to provide the Supreme Court of North Carolina with an adequate basis for its decision to grant or deny review. [*Id.* at 615.]

These three items, (1) a transcript, (2) an argument setting forth his claims of error, and (3) an opinion, will also be present for a defendant in Michigan. Even if trial counsel raises arguments orally on the record, instead of in a written brief,

there will be a transcript so the defendant will have sufficient tools to bring an application for leave in Michigan.

The dissenting opinion in *Bulger* provided an apt description of what the Michigan system requires of the trial counsel:

> Accordingly, construing the rules in such a fashion [as the majority opinion in *Bulger*] that trial counsel would become the only standard-bearer for postconviction motions would entail an extension of the defendant-trial counsel relationship. The traditional end of that relationship was the appointment of appellate counsel, usually following and pursuant to the defendant's execution of the State Court Administrator's Office form given to defendant at sentencing.
>
> However, the majority's decision would extend this relationship for a time, matching the time for filing an application for leave to appeal, which is, under MCR 6.311(A), the time when a defendant may file a motion to withdraw a plea. Given the various scenarios possible under MCR 7.205(F) for filing a delayed application for leave to appeal, a defendant-trial counsel relationship could last up to, and in some cases beyond, twelve months following sentencing. [*Bulger*, *supra*, 462 Mich. at 572 (Cavanagh, dissenting) (paragraph break added).]

In requiring that the trial counsel continue to represent a defendant even after the conviction and sentence is complete under MCR 6.005(H)(4), the Michigan system provides a defendant counsel to create the record necessary to bring an application for leave where the trial court has rejected the effort to set aside the plea or has rejected the sentencing claim. Because trial counsel must move to set aside the plea under

MCR 6.311 or object to the sentencing under MCR 6.429, at the very least, there will be an argument on the record regarding the basis for the motion. Unless made in open court, a motion filed in Michigan courts must be in writing, and if it raises an issue of law, it must be accompanied by a brief. MCR 2.119(A)(1), (2). The court rules also entitle an indigent defendant to free copies of court documents, including transcripts. MCR 6.433. The free transcript will be available for a defendant from which to marshal the arguments previously raised by trial counsel and any additional contentions, and there will be either a written decision or a transcribed record of the trial court's decision on the matter.

Moreover, by placing the responsibility for raising these issues on counsel for the first review of the claim, see MCR 6.005(H)(4), the Michigan system places the initial obligation on the trial counsel to identify the valid issues. Consequently, Michigan does not leave a defendant alone to identify the meritorious issues, but places this obligation initially on trial counsel.

By the nature of the plea proceeding, the possible issues that a defendant can raise as a basis on which to withdraw his plea, however, will be fewer and less complicated than the potential issues after a full trial. The *Bulger* Court explained that the nature and relative simplicity of the plea proceedings greatly reduces the possible complexity of the claims of error:

> Plea proceedings are also shorter, simpler, and more routine than trials; the record most often consists of the "factual basis" for the plea that is provided to the trial court. In contrast with trials, less danger exists in plea cases that the record will be so unclear, or the errors so hidden, that the defendant's appeal will be reduced to a meaningless ritual. Also, a concession of guilt limits considerably the potential issues that can be raised on appeal. [*Id.* at 517.]

There is no question, of course, that an appellate attorney would assist a defendant in raising these issues on appeal. But this is not the test to determine whether a defendant has an adequate opportunity to advance his arguments in the appellate system. *Ross*, *supra,* 417 U.S. at 612, 616:

> The Fourteenth Amendment does not require absolute equality or precisely equal advantages, nor does it require the State to equalize economic conditions. It does require that the state appellate system be free of unreasoned distinctions, and that indigents have an adequate opportunity to present their claims fairly within the adversary system.
>
> * * *
>
> *The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.* [Citations and internal quotation marks omitted; emphasis added.]

The Michigan appellate system makes a distinction between appeals from convictions based on trials, which are by right, and appeals from convictions based on guilty pleas, which are discretionary. Because this distinction is based on legitimate and permissible differences between trials and guilty pleas, the Michigan appellate system is "free of unreasoned distinctions."

Id. See also *Rinaldi v. Yeager,* 384 U.S. 305, 310 (1966).[20] The sufficiency of the record available for the indigent defendant in bringing an application corresponds to the nature of the proceedings and the types of arguments that will be available to him and enables him to provide the Michigan Court of Appeals "with an adequate basis for its decision to grant or deny review" of the merits. *Ross, supra,* 417 U.S. at 615.

3. Michigan law comports with the principles underlying *Griffin*.

The Michigan system of review also satisfies the basic values that underlie *Douglas* and *Ross,* as articulated in *Griffin v. Illinois*, 351 U.S. 12 (1956). In *Griffin*, this Court examined an Illinois statute that provided an indigent with a free transcript of the trial only to raise claims of constitutional errors, but not to raise other trial errors such as the admissibility and sufficiency of the evidence. *Id.* at 15.

In his analysis for the plurality opinion, Justice Black noted that all of the States provided some method of appeal from criminal convictions "recognizing the importance of appellate review to a correct adjudication of guilt or innocence." *Griffin, supra,* 351 U.S. at 18. Based on the significance of such a review, he determined that a system that denied "adequate review to the poor" was unequal and would allow "unjust convictions" to stand that would otherwise be set aside. *Id.* at 19. He also noted that a defendant's ability to pay had no "rational relationship to a defendant's guilt or innocence" and

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[20] In *Rinaldi,* this Court noted the following:

> This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.

should not be a condition of obtaining a fair trial. *Id.* at 17-18. Both *Douglas* and *Ross* discussed these principles.

Applying these principles to the Michigan system of review, a defendant's ability to have his guilt or innocence reviewed is not based on his income – the State of Michigan provides an indigent defendant an attorney to represent him at trial, MCR 6.005(D), and, where the defendant pleads guilty, this appointed attorney has the responsibility to raise postconviction motions that challenge the validity of the defendant's plea and sentence. MCR 6.005(H)(4) These challenges might otherwise be barred from review. MCR 6.311(C); MCR 6.429(C).

In the concurrence in *Griffin* that comprised the fifth vote, Justice Frankfurter agreed that the Illinois statute prevented the petitioners from receiving adequate means of reviewing a possibly unfair conviction. But Justice Frankfurther also recognized that a State is empowered to make "appropriate" decisions regarding its resources in reviewing such convictions:

> But in order to avoid or minimize abuse and waste, a State may appropriately hedge about the opportunity to prove a conviction wrong. When a State not only gives leave for appellate correction of trial errors but must pay for the cost of its exercise by the indigent, it may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent. *The growing experience of reforms in appellate procedure and sensible, economic modes for securing review still to be devised, may be drawn upon to the end that the State will neither bolt the door to equal justice nor support a wasteful abuse of the appellate process.* [*Id.* at 24 (Frankfurther, J., concurring) (emphasis added). See also *Smith v. Robbins*, 528

> U.S. 259, 277-278 (2000), quoting Justice Frankfurter.]

The State of Michigan has drawn this balance. Significantly, for sentencing errors, Michigan recognizes that where there has been a departure from the guidelines, there is more likely to be a meritorious claim of error and the rules require the trial court to provide counsel to the indigent for the application for leave. See MCL 770.3a. For other errors related to the validity of the conviction and for sentencing errors more generally, Michigan relies on the trial counsel to raise these issues in the trial court and to create the necessary record to allow an indigent defendant to bring the application for a second, discretionary appellate review.

This Court has recognized that States have an ability to serve as "laboratories" to test solutions to novel legal problems within the limits of the Constitution. *Smith v. Robbins*, 528 U.S. at 275-276. The State of Michigan has taken this opportunity to provide one method of addressing appeals from plea-based convictions.

C. In Michigan, the review of an application to the Court of Appeals is *discretionary*.

In *Ross*, this Court provided the framework for determining whether a review on appeal was discretionary or on the merits. The definition hinged on whether the determination to grant leave was based on the correctness of the lower court's decision or on some other considerations:

> We are fortified in this conclusion [that a defendant has meaningful access to bring an application for leave] by our understanding of the function served by discretionary review in the North Carolina Supreme Court. The critical issue in that court, as we perceive it, *is not whether there has been "a correct*

> *adjudication of guilt" in every individual case*, but rather whether "the subject matter of the appeal has significant public interest," whether "the cause involves legal principles of major significance to the jurisprudence of the State," or whether the decision below is in probable conflict with a decision of the Supreme Court. The [North Carolina] Supreme Court may deny certiorari even though it believes that the decision of the Court of Appeals was incorrect, *since a decision which appears incorrect may nevertheless fail to satisfy any of the criteria discussed above.* [*Id.* at 615 (citations omitted; emphasis added).]

In other words, the fact that the court may deny leave even where the lower court's decision was incorrect means that the reviewing court has discretion whether to grant leave. Given this understanding, in a discretionary appeal, a defendant does not have a right to have an erroneous decision corrected.

1. The Michigan Supreme Court in *Bulger* made clear that the review of guilty-plea convictions by the Michigan Court of Appeals is discretionary.

In Michigan, this matter was definitively resolved by the Michigan Supreme Court in examining the same basic constitutional issue as the one raised here. In *Bulger, supra,* 462 Mich. at 499,[21] that Court specifically held that the review by the Michigan Court of Appeals in examining an application for leave from a plea was *discretionary*:

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[21] The only difference was that the Michigan Supreme Court was examining the constitutionality of the court rule that limited the circumstances in which the trial court would appoint counsel to assist in the filing an application for leave as opposed to the statute, MCL 770.3a, which is at issue here. See n. 5, *supra.*

> We hold that neither the state nor the federal constitution requires the appointment of counsel under these circumstances. Under our federalist scheme of government, Michigan remains free to decide the conditions under which appellate counsel will be provided where our *state constitution commands that the mechanism of appellate review is discretionary.* [Emphasis added.]

In the Michigan legal system, the Michigan Supreme Court is the supreme authority in defining the meaning of the court rules. See *McDougal v. Schanz,* 461 Mich. 15, 26; 597 N.W.2d 148, 154 (1999), citing the Michigan Constitution, Const. 1963, art 6, §5. Therefore, despite the standard language of the order themselves, which state that the Court of Appeals is denying "for lack of merit in the grounds presented," this review is not a decision on the merits of the underlying legal claims.

In fact, the dissenting opinion in *Bulger* frankly acknowledged that the Michigan Court of Appeals may reject leave even though the trial court's decision was "incorrect":

> Nothing in our court rules or statute preclude the Court of Appeals from denying leave even though it may believe that the trial court's decision was incorrect. Loosely defining "incorrect," such a rule might well be appropriate, because it might be uneconomical, even pointless, for the Court of Appeals to correct a trial court decision on a minor point that would not affect the final decision. Likewise, this might be the case when a court below reached a correct result for an incorrect reason. Again, barring other considerations, concerns of judicial economy might counsel against granting leave. [*Id.* at 542-543 (Cavanagh, J., dissenting).]

Consistent with this point, the court rules provide no limitations or requirements for the Michigan Court of Appeals to determine on what basis the court should or must grant leave. MCR 7.205. There is no basis on which to claim that a defendant has a right to a decision on the merits in bringing an application. These orders denying leave to appeal do not fall within the criteria for publication, MCR 7.215(B); are not precedentially binding under the rule of *stare decisis*, MCR 7.215(C); are not even within the definition of "judgments" of the Court; and are "not deemed to dispose of an appeal" for purposes of execution, enforcement, and timing of subsequent events. MCR 7.215(E)(1).

2. Other case law supports this conclusion.

The Michigan Supreme Court's holding in *Bulger* also confirmed the existing black-letter law in Michigan regarding the meaning of orders denying discretionary applications for leave to appeal. Such orders by both the Michigan Supreme Court and the Michigan Court of Appeals are not decisions on the merits of the underlying legal issues.

In *Great Lakes Realty Corp v. Peters*, 336 Mich. 325, 328-329; 57 NW 2d 901 (1953), the Michigan Supreme Court stated:

> The denial of an application for leave to appeal is ordinarily an act of judicial discretion equivalent to the denial of certiorari. It is held that the denial of the writ of certiorari is not equivalent of an affirmation of the decree sought to be reviewed. [Citations omitted].

In *People v. Berry*, 10 Mich. App. 469, 473-474; 157 N.W. 2d 310, set aside on other grounds, 14 Mich. App. 620; 165 N.W.2d 896 (1968), the Michigan Court of Appeals relied on *Peters* and held that the Court was not barred from reviewing

the merits of an issue even though an application for leave to appeal had previously been denied:

> [D]enials of applications for leave to appeal do not import an expression of opinion on the merits of a cause, but rather are acts of judicial discretion. For this reason such denials cannot be afforded res judicata treatment. This Court is not barred from looking into the merits of the present cause. [Citations omitted; emphasis added.]

See also *State ex rel Saginaw Prosecuting Attorney v. Bobenal Invest, Inc,* 111 Mich. App. 16, 22 n 2; 314 NW 2d 512 (1981) in which the Michigan Court of Appeals held that two previous orders that denied applications for leave to appeal "for lack of merit in the grounds presented" were not adjudications on the merits.[22]

In Petitioner's brief, pp. 27-28, he cites four different sources of authority to attempt to establish that a denial of leave on a plea-based convictions is a decision on the merits and is not a discretionary appeal despite the clear holding of *Bulger*: (1) three Michigan Court of Appeals cases all involving motions to remand rather than applications for leave to appeal; (2) six unpublished Michigan Court of Appeals opinions that are not precedential under Michigan law under MCR 7.215(C)(1); (3) individual opinions by two Justices of the Michigan Supreme Court in an order denying leave to

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[22] Defaults had been entered against two parties, and the trial court denied motions to set them aside. The parties appealed separately, and the applications for leave to appeal were denied by the Michigan Court of Appeals on April 4, 1980 (Mich. App. Docket No. 50540) and April 8, 1980 (Mich. App. Docket No. 50736). Both orders contained the form language: "IT IS FURTHER ORDERED that the application for leave to appeal be, and the same is hereby DENIED for lack of merit in the grounds presented."

appeal; and (4) a Sixth Circuit Court of Appeals habeas corpus case.[23]

Each of these cited cases from Petitioner is irrelevant to the question at hand because they do not involve a response to an application from a defendant's plea-based conviction, they are not precedential authority, and, more importantly, they do not address the Michigan Supreme Court's decision in *Bulger* that the decision to grant leave is discretionary with the Court of Appeals. These reasons require this Court to reject Petitioner's argument.

3. Petitioner's case confirms that this is discretionary review.

On appeal, Petitioner argued that OV 9 was wrongly scored in the first case where he pleaded guilty to the sexual touching of one young girl and, therefore, the Department of Corrections could not have scored this variable at 10 points for two or more victims. See MCL 777.39. Petitioner is correct.[24]

Nevertheless, this error would have had no bearing on the sentencing guidelines because Petitioner would have had a total of 35 points for his offense variables, which would still have placed him in the A-IV grid (because level IV's range is 35-to-

[23] Petitioner relies on *Abela v. Martin*, 380 F.3d 915, 923 (6th Cir. 2004) that addressed an appeal from a trial court's denial of a motion for relief from judgment under MCR 6.508(D) after an initial appeal by right to the Court of Appeals had failed. This case conflicts with an earlier decision in the Sixth Circuit on the same issue in *McKenzie v. Smith*, 326 F.3d 721, 726-727 (6th Cir. 2003), *cert denied*, 540 U.S. 1158 (2004).

[24] Under Michigan law, the Court of Appeals has held that the sentencing offense relates to the particular transaction that occurred, and the number of victims is limited to that transaction. *People v. Cheseboro*, 206 Mich. App. 468, 471-473; 522 N.W.2d 677 (1994) (scoring zero points because only "one victim involved in the criminal transaction").

49 points). See discussion at Resp. Brief in Opp. to Pet., pp 30-31. Where the error would not affect the scoring of the guideline range, Michigan law provides no relief. *People v. Houston*, 261 Mich. App. 463, 473; 683 N.W.2d 192 (2004).

In fact, this case provides an example of the point that there is no right in the court rules or law to have an error corrected in an appeal from a plea-based conviction. Because there is no right to a review on the merits, the Court of Appeals can rely on considerations that are not dependent on the validity of the trial court's decision on Petitioner's claim, but rather rely on factors outside of it to deny leave regardless whether Petitioner was right in his appellate claim. In particular, here, the Court of Appeals might have denied leave without even examining Petitioner's OV 9 claim because PRV 7 was wrongly scored in the first case in his favor.[25] Because the prosecutor did not appeal the issue, this claim would not have been before the Court. Unlike the OV 9 error, *this error would have increased the guidelines*, transforming Petitioner from an A-IV to C-IV (from 12-to-24 months to 29-to-57 months) because the PRV level would increase from A to C (10-to-24 points) for the first case. Petitioner would then have been at 29-to-57 months on each offense and, where the trial court gave all indications of sentencing at the highest end within the guidelines, Petitioner might have been facing another 33 months on his minimum. Consequently, the Michigan Court of Appeals might have

[25] The Department of Corrections neglected to score PRV 7 (concurrent conviction) at 10 points despite the fact that Petitioner pleaded guilty to two offenses at the same time. Under Michigan law, the sentencing guidelines for each offense reflect the ten points for a concurrent conviction regardless which one took place first. See MCL 777.57. The statute provides that the court is to score for concurrent convictions for each offense where the defendant "was convicted of a felony after the sentencing offense was committed." MCL 777.57(2)(a). For the first and second cases, the conviction on both cases entered concurrently and after the crimes occurred, i.e., each conviction is subsequent to each crime. The statute limits the scoring for mandatory consecutive sentencing, but these offenses were only permissively consecutive. See MCL 768.7b(2)(a).

denied leave, without reaching the merits of Petitioner's appellate claim, by relying on considerations independent of whether Petitioner was correct in his claim.

In brief, Michigan law is clear that applications for leave from plea-based convictions are discretionary appeals and a defendant does not have a right to a merits review.

D. This Court's jurisprudence since *Ross* confirms that there is no constitutional right to appellate counsel in seeking a second, discretionary review.

This Court has reaffirmed many times since *Ross* that there is no constitutional right to a second, discretionary review of the validity of a court proceeding or a court action. Likewise, there is no constitutional right to a two-review state system, or to have a different court examine a trial court's decision, or to have a second attorney identify any meritorious claims of error related to a defendant's conviction.

In *Pennsylvania v. Finley, supra,* 481 U.S. at 555, this Court examined whether appellate counsel representing a defendant in a collateral attack on the defendant's conviction had an obligation to file an *Anders* brief.[26] In concluding that there was no such obligation, this Court provided a description of the black-letter law from *Douglas* and *Ross*:

> We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to so today. Our cases establish that the right to counsel extends to the first appeal of right, and no

[26] In *Anders v. California,* 386 U.S. 738, 739, 744 (1967), this Court outlined the procedure when a court-appointed attorney saw no meritorious basis for a claim where that attorney was appointed to bring the appeal from a defendant's conviction.

> further. Thus, we have rejected suggestions that we establish a right to counsel on discretionary appeals. We think that since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori*, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process. [*Id.* at 555 (citations omitted).]

Significantly, this Court noted that the right to appointed counsel on appeal was limited to the "first appeal of right" and that the Constitution did not establish a right to counsel for "discretionary appeal[s] on direct review." *Id.* Applying this rule here, Petitioner has no right to appointed counsel for his discretionary appeal to the Michigan Court of Appeals.

Almost without exception, in its restating of the holding in *Douglas* and *Ross,* this Court has expressly noted that the constitutional right to appointment of appellate counsel, where the State establishes an appellate process, is for the first appeal brought "*as of right.*" E.g., *Evitts v. Lucey,* 469 U.S. 387, 394 (1985) ("This right to counsel is limited to the first appeal as of right.")[27] This Court did, however, in a plurality opinion, state that "an indigent defendant is similarly entitled as a matter of right to counsel for an initial appeal from the judgment and sentence of the trial court." *Murray v. Giarratano,* 492 U.S. 1, 7 (1989). But *Murray* was only examining whether *Finley* applied to a postconviction proceeding in which the defendant was facing the death penalty. This Court was not addressing the issue whether a defendant had the right to the appointment of counsel for a discretionary appeal. *Id.*

[27] See also *United States v. MacCollum,* 426 U.S. 317, 324 (1976) ("In [*Douglas*], the Court held that the State must provide counsel for an indigent on his first appeal as of right").

In *Evitts,* this Court elaborated on the distinctions between a first appeal by right and a second, discretionary application for review. In reiterating the point that the "right to counsel is limited to the first appeal of right," 469 U.S at 394, this Court's analysis confirms that the Michigan system accords with constitutional principles. In *Evitts,* this Court examined the Kentucky appellate system in which the State of Kentucky argued that the defendant had "a conditional right" to appeal. The State of Kentucky claimed that its system did not grant an appeal of right based on the argument that an appeal was subject to dismissal if the state rules were violated. But this Court noted that fallacy of this argument, quoting the Kentucky Constitution which provided that "'[in] all cases, civil and criminal, there shall be allowed as a matter of right at least one appeal to another court.'" *Evitts, supra,* 469 U.S. at 402. Therefore, contrary to the Michigan system, the Court there was examining an appeal by right.

More significantly, however, this Court explained that "[a] system of appeal as of right is established precisely to assure that only those who are validly convicted have their freedom drastically curtailed." *Evitts, supra,* 469 U.S. at 399-400. The Court then noted that a criminal defendant in the Kentucky system would not have had a previous opportunity to present this claim in the appellate process and would not have any of the tools in which to advance an appeal. *Id.* at 402.

But this is the very point of the Michigan system. For that class of plea-based convictions that do not qualify for appointed counsel, the Michigan system requires that the trial counsel bring these issues before the trial court, which then sits as the first court in review of the plea's validity and sentencing claims. MCR 6.311; MCR 6.429. Consequently, unlike the Kentucky system in *Evitts,* the Michigan system ensures that the first review occurs with the assistance of counsel, MCR 6.005(H)(4), and that the indigent defendant will have the necessary tools to bring a meaningful application for leave to

appeal to the Michigan Court of Appeals where the first review in trial court is unsuccessful.

Finally, Petitioner asserts that this Court's analysis in *Coleman v. Thompson,* 501 U.S. 722, 742 (1991) made clear that the right to appointed counsel attaches even if the first appeal is by application for leave. Petitioner's brief, pp 21-22. In that federal habeas corpus case, this Court considered the question whether an attorney's error in state habeas corpus operated as a default in federal habeas, and concluded that it did not because there was no constitutional right to counsel in a state habeas action. *Coleman, supra,* 501 U.S. at 755. In reaching that conclusion, this Court analyzed the question of when the State of Virginia will extend the time in which a person can file a late state habeas, and stated in passing that the state case that held a defendant had the right to counsel from his first appeal "was required" under *Douglas. Coleman, supra,* 501 U.S. at 742. This conclusion assumed, without deciding, that such an appeal was by right. This is clear from the opinion's later reference to *Douglas,* which provides that a defendant has a right to appointed counsel in a first appeal "of right in state court." *Coleman, supra,* 501 U.S. at 755. Unlike the Virginia system, however, the application for leave to appeal in Michigan is a discretionary review. Moreover, by the scheme established in Michigan, the application is a request for a second review of the merits of a defendant's conviction and sentence.

In summary, the Michigan system has established a balance by ensuring a defendant a fair review and meaningful access to the appellate process while sensibly allocating Michigan's economic resources. See *Griffin, supra* (Frankfurter, concurring).

II. A defendant may validly waive his right to the appointment of counsel on appeal where that waiver is knowing, voluntary, and intelligent.

A. The waiver must be knowing, voluntary, and intelligent.

A waiver is the intentional relinquishment of a known right or privilege. *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). Regarding the right to counsel, this Court explained that the validity of a defendant's waiver is dependent on the particular facts and circumstances surrounding the waiver:

> The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. [*Johnson v. Zerbst, supra,* 304 U.S. at 464.]

Like the waiver of any constitutional right, waivers of the right to counsel "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady, supra,* 397 U.S. at 748. See also *Iowa v. Tovar,* 541 U.S. 77, __; 124 S. Ct. 1379, 1383 (2004). The waiver is sufficiently knowing where the defendant "fully understands the nature of the right and how it would likely apply *in general* in the circumstances – even though the defendant may not know the *specific detailed* consequences of invoking it." *United States v. Ruiz,* 536 U.S. 622, 629 (2002) (emphasis in original).

A defendant's ability to waive a constitutional right often serves a broader social interest. *New York v. Hill,* 528 U.S. 110, 117 (2000), citing *Adams v. United States ex rel. McCann,* 317 U.S. 269, 275 (1942) (waiver of right to jury trial). There is a presumption that a constitutional right may be the subject

of a valid waiver. See *United States v. Mezzanatto,* 513 U.S. 196, 200-201 (1995).

This Court's analysis in *Iowa v. Tovar,* which involved an uncounseled defendant, provides a useful comparison to the ability in this case of a *counseled defendant* to make the decision to waive his right to have appellate counsel assist him in a discretionary application for leave to appeal.[28]

In *Tovar,* this Court examined the validity of a waiver by a defendant who stood before the trial court charged with a crime for which he was facing incarceration of up to a year in jail. The Iowa Supreme Court had concluded that the following admonishments were necessary to ensure that the waiver was valid:

> - The trial judge must advise the defendant generally that there are defenses to criminal charges that may not be known by laypersons and that the danger in waiving the assistance of counsel in deciding whether to plead guilty is the risk that a viable defense will be overlooked;
>
> - The defendant should be admonished that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty. [*Tovar, supra,* 124 S. Ct. at 1379 (formatting added; internal quotes and brackets omitted).]

This Court rejected the contention that the Sixth Amendment compelled these requirements. Rather, without any prior

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[28] The *Iowa v. Tovar* case involved a defendant's specific Sixth Amendment right to trial counsel whereas here Petitioner is asserting a generalized Fourteenth Amendment due process and equal protection claim to appellate counsel.

assistance of counsel, the defendant elected to proceed, waiving his right to have an attorney, and pleaded guilty to the offense. He was then sentenced to serve jail time. *Tovar, supra,* 541 U.S. at __; 124 S. Ct. at 1385. This Court held that, in the particular circumstances of the case, this uncounseled waiver was valid:

> The constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea. [*Tovar, supra,* 124 S. Ct at 1383.]

In this way, the defendant Felipe Tovar stood convicted after his plea in the trial court without any advice from an attorney about whether there were possible defenses to the charge or whether the evidence against him might not have been admissible, i.e., whether his statement was involuntary or the results of the intoxilyzer test were unreliable.

In contrast, in this appeal, Petitioner had the trial assistance of a retained attorney for his two charged offenses. Before the sentencing that was taken on both cases on November 7, 2001, there had been at least two pretrial hearings. J.A. 1, 4. For each hearing, defendant would have conferred with his counsel at the preliminary examination, which Michigan law provides may be waived by the defendant as they were here. MCR 6.110(A). At the sentencing itself, the prosecutor placed the terms of the agreement on the record. J.A. 18. Petitioner's attorney then noted that he conferred with Petitioner regarding the substance of the plea agreement:

> That's a correct statement. This is what I have discussed with my client, Your Honor. He does understand it and we do wish to enter a plea of no

> contest to the two counts as referred to contained in these two cases.
>
> * * *
>
> With that being said, Your Honor, I believe my client does understand this agreement and is prepared to enter into the plea of no contest at this time, and we do stipulate to the reports [i.e., police reports] as referred to by the prosecutor. [J.A. 18-19.]

At this point, consistent with MCR 6.302, defendant was informed of the list of rights that he would be waiving, including "any claim of appeal as of right" and that he would have the assistance of appointed counsel in certain listed situations if he did wish to apply for leave. J.A. 22-23.[29]

In comparing *Tovar,* the right that defendant Felipe Tovar waived – his right to the assistance of counsel at trial – was significantly more important that the right Petitioner waived. Petitioner here waived his right to the assistance of appellate counsel with his "eyes open," *Tovar, supra,* 124 S. Ct. at 1387, where he pleaded guilty with the assistance of counsel, knowing what the terms of the agreement were regarding the sentencing implications of his decision to plead guilty (after at least twice previously having conferred with counsel). The only right Petitioner was forgoing, as required in Michigan for all pleas, was the right to have the assistance of appointed counsel to bring an application for discretionary leave to appeal. MCL 770.3a. And this waiver occurred at the same time that his attorney had negotiated a plea agreement the day *after* the trials were scheduled to begin. J.A. 17. In the context of the full plea proceedings, and in comparison to the right

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[29] See argument in paragraph (B), *infra* about the point that this waiver was sufficient to waive any right defendant had to the appointment of appellate counsel.

waived in *Tovar,* the right Petitioner waived here was of relatively limited value.

Defendant Felipe Tovar waived his right to the assistance of counsel before there had been any determination of his guilt, where no attorney had examined his case, and when all the possibilities of defense were still before him. *Tovar, supra,* 124 S. Ct. at 1384-1385. He was pleading guilty to the offense as charged, with no statement of the limitations on his punishment other than the offense's statutory maximum. *Id.* In pleading guilty, defendant Tovar also waived a range of constitutional rights concerning possible claims of violations that may have occurred before the plea. *Tovar, supra,* 124 S. Ct. at 1384 (jury, presumption of innocence, right to subpoena witnesses, right to compel testimony); see also, *Tollett v. Henderson,* 411 U.S. 267, 258 (1973) (after pleading guilty, a defendant "may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the plea"). Defendant Tovar would only be left with an opportunity to attack the voluntary and intelligent character of the plea if he wished to challenge the conviction. *Id.* In brief, defendant Tovar was waiving arguably the most important defense right – his right to the assistance of counsel – at the time that the attorney could provide the most assistance, right after he was arraigned on the charges.

In recognizing that the value of the right of the assistance of counsel that defendant Tovar waived far surpassed the value of the right that Petitioner waived, there is every reason to accord the presumption of validity to defendants waiver of a constitutional right in these particular circumstances. See *Mezzanatto, supra,* 513 U.S. at 200-201. The only relevant issue is whether, under *Iowa v. Tovar,* the waiver was knowing, intelligent, and sufficiently aware of the nature of the right and how it would apply in general even if he did not know specific detailed consequences. *Iowa v Tovar, supra,* 124 S. Ct. at

1389, citing *Ruiz, supra,* 536 U.S. at 629. Here, Petitioner's waiver met this standard.

B. The trial court's instructions were adequate to inform Petitioner of the fact that he was waiving the right to the appointment of appellate counsel in pleading guilty.

Petitioner argues that Petitioner never expressly waived his right to the assistance of appellate counsel because the trial court never told him that he would not be appointed counsel on appeal. Petitioner's brief, pp 46-47. This argument misses the clear context in which the trial court was asking these questions. After listing the rights that Petitioner was waiving, the trial court asked and Petitioner confirmed that he understood that he was giving up his claim of an "appeal as of right." J.A. 22.

The trial court then informed Petitioner of the circumstances in which the court was required to appoint him counsel and the circumstances in which the court had discretion to appoint him counsel, each time specifying that it was "under those conditions" that counsel would or could be appointed. J.A. 22-23. Significantly, Petitioner was assisted by his retained attorney at the time and he and counsel had discussed the plea and he understood it. J.A. 18-19. In context, the court's questions were clear that these were the *only* circumstances in which Petitioner would receive appointed counsel. This was a knowing waiver.

C. There is nothing unfair or unequal in including a waiver of the right to appointed appellate counsel as part of an otherwise valid guilty plea. The lower federal courts have also recognized that a defendant may validly waive his right to appeal *entirely* as a condition of his plea.

The United States Courts of Appeal have unanimously recognized that a defendant may waive his right to appeal as a part of a negotiated plea agreement. *United States v. Teeter,* 257 F.3d 14, 15-16 (1st Cir. 2001).[30] The federal rules of criminal procedure also recognize that a federal district court should instruct a defendant regarding this matter where it is a part of the plea agreement. Fed. R. Crim. Pro. 11(b)(1)(N).[31]

The courts have identified, however, certain exceptions to the waiver, where the court has authority to review the record to ensure that the waiver was knowing and voluntary, that the sentence was not illegal by exceeding the statutory maximum, that the sentence did not violate the terms of the plea

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[30] Citing *United States v. Hernandez,* 242 F.3d 110, 113 (2nd Cir. 2001); *United States v. Brown*, 232 F.3d 399, 403 (4th Cir. 2000); *United States v. Cuevas-Andrade*, 232 F.3d 440, 446 (5th Cir. 2000);*United States v. Fleming*, 239 F.3d 761, 763-64 (6th Cir. 2001); *United States v. Jemison*, 237 F.3d 911, 917 (7th Cir. 2001); *United States v. Michelsen*, 141 F.3d 867, 871 (8th Cir. 1998); *United States v. Nguyen*, 235 F.3d 1179, 1182 (9th Cir. 2000); *United States v. Black*, 201 F.3d 1296, 1300 (10th Cir. 2000); and *United States v. Howle*, 166 F.3d 1166, 1168 (11th Cir. 1999).

[31] Under rule 11(b)(1), the federal rules of criminal procedure provide the following:

> During this address, the court must inform the defendant of, and determine that the defendant understands, the following:
>
> * * *
>
> (N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

agreement, or that the plea violated some other public policy constraint. See *United States v. Black,* 201 F.3d 1296, 1300 (10th Cir. 2000); see also *United States v. Jeronimo,* No. 03-30394, 2005 U.S. App. LEXIS 3129, at *9, n 2 (9th Cir. February 23, 2005). Employing these same exceptions to the waiver of the claim to appointment of appellate counsel in these circumstances, the only relevant issue raised on appeal is the validity of the waiver. The sentencing transcript demonstrates the validity of Petitioner's waiver.

Petitioner also argues that allowing a defendant to waive any claim to the appointment of appellate counsel would undermine this Court's jurisprudence on an indigent defendant's right to be free from filing fees, *Burns v. Ohio,* 360 U.S. 252, 257-258 (1959), and from transcript costs, *Griffin, supra.* The Michigan legal system does not require a defendant to waive his right to free filings or free transcripts. They are provided for free in the Michigan system. Therefore, this issue is not implicated by the Michigan legal system and there is no need for this Court to address this hypothetical issue.

Rather, in this case, there is every reason to give effect to Petitioner's knowing waiver, given with the assistance of counsel, to any claim that he has the right to the assistance of appellate counsel to prepare his application.

CONCLUSION

For these reasons, Respondent asks this Court to affirm the denial of leave from the Michigan Supreme Court and hold that that Petitioner does not have a constitutional right to appointed appellate counsel in seeking discretionary review, and that MCL 770.3a is constitutional.

Respectfully submitted,

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ANTONIO DWAYNE HALBERT,

Petitioner,

v.

MICHIGAN,

Respondent.

On Writ Of Certiorari To The Michigan Court Of Appeals

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF

Most of Respondent's argument consists of an attempt to recharacterize the appeal at issue in this case. According to Respondent, Petitioner's application for leave to appeal to the Michigan Court of Appeals following his plea-based conviction was, despite all appearances to the contrary, a *second-tier* appeal because there is a Michigan court rule that allows for the preservation of issues in the trial court before an appeal is filed. Further, Respondent claims, Petitioner's appeal was *discretionary*, even though the Court of Appeals rejected it on the merits with preclusive effect, simply because the Michigan Supreme Court once referred to such appeals as discretionary. Thus, Respondent claims that Petitioner's appeal was just like the second-tier, discretionary appeal at issue in *Ross v. Moffitt*, 417 U.S. 600 (1974), for which counsel was not required.

Respondent's argument fails at every turn. Petitioner's application for leave to appeal was manifestly a *first-tier* appeal (as even Respondent's *amici* admit). The court rule on which Respondent relies does not provide an "appeal"; it is nothing more than a post-sentencing issue preservation procedure. That procedure was not used in Petitioner's case and is, in fact, almost never used because trial attorneys usually either preserve appellate issues at the time they arise or do not preserve them at all. More importantly, this Court has directly rejected precisely such an attempt to characterize the availability of a post-sentencing issue preservation procedure as the equivalent of a first-tier appeal. *Swenson v. Bosler*, 386 U.S. 258 (1967).

Petitioner's application was also not *discretionary* as it was decided on the merits. The fact that the Michigan Supreme Court once labeled such applications "discretionary" does not make it so, particularly given that the same court also recognized that such applications are decided on the merits. Even if such applications truly were discretionary, Michigan would still have to provide appellate counsel in order to meet the meaningful access standard of *Ross*.

Respondent also argues that since some courts have held that a defendant may negotiate away his or her right to appeal as a condition of a plea, Michigan may require all indigent plea defendants to waive their right to appellate counsel. But Respondent misses the point that appellate waivers affect the rich and poor alike while Michigan's system denies meaningful appeals only to the indigent. The proper analogy would be a jurisdiction that required indigents, and only indigents, to waive their right to appeal in order to receive the benefits of a plea. The effect of Michigan's system is exactly that. A forced waiver applicable only to the poor cannot salvage Michigan's unconstitutional scheme.

I. Petitioner's Application for Leave To Appeal Was a First-Tier Appeal on the Merits.

A. Respondent's Claim That a Post-Sentencing Motion by Trial Counsel Is a First-Tier Appeal Is Both Contrary to *Swenson v. Bosler* and Wrong as a Matter of Fact.

Respondent admits that *Douglas v. California*, 372 U.S. 353 (1963), requires the appointment of appellate counsel "where a State grants a defendant a first appeal as

of right on the merits." Resp. Br. 21. The centerpiece of Respondent's argument, however, is the claim that a Michigan indigent who is convicted by plea receives first-tier appellate review in the trial court because Michigan Court Rule 6.005(H)(4) requires appointed trial counsel to file "postconviction motions the lawyer deems appropriate." Resp. Br. 17-21. Since it is a lawyer who files these motions, Respondent reasons, this procedure is all that is required to satisfy *Douglas*. Resp. Br. 21-31.

The most obvious objection to this argument is that this Court squarely rejected it in *Swenson v. Bosler*, 386 U.S. 258 (1967) (*per curiam*). In *Swenson*, this Court considered a pre-*Douglas* Missouri scheme in which "[i]f trial counsel filed a motion for new trial and notice of appeal and then withdrew from the case, the Supreme Court of Missouri would require preparation of the transcript for appeal and then would consider the questions raised by the motion for new trial on the basis of pro se briefs by the defendant-appellant, or on no briefs at all." *Id.* at 259.

This Court unanimously concluded that this scheme violated *Douglas* "even though respondent's trial counsel filed the notice of appeal and a motion for new trial which specifically designated the issues which could be considered on direct appeal." *Id.* The Court specifically found this scheme unconstitutional because it denied the indigent "the assistance of *appellate counsel* in preparing and submitting a *brief* to the appellate court which defines the legal principles upon which the claims of error are based and which designates and interprets the relevant portions of the trial transcript[.]" *Id.* (emphasis added); *accord Evitts v. Lucey* 469 U.S. 387, 394 (1985) (citing *Bosler* for importance of appellate brief prepared by counsel).

In many respects, the Missouri scheme this Court struck down in *Bosler* was far better than the Michigan scheme at issue here. Unlike the Missouri system, which required that *all* appellate issues first be raised in a motion for new trial, *id.* at 258, the vast majority of appellate issues following plea-based convictions in Michigan will not, or need not, be raised in a post-sentencing motion. In fact, written post-sentencing motions by trial counsel in plea cases are exceedingly rare in Michigan because they are filed if and only if two conditions occur: (1) trial counsel failed to preserve the issue at the time it arose; and (2) after sentencing, the same trial counsel who failed to raise the issue realizes his or her mistake and decides to correct it by filing a post-sentencing motion.

Petitioner's case illustrates the point. Petitioner's trial counsel preserved one appellate issue at the time it arose by orally requesting concurrent sentences before the sentences were imposed. J.A. 33. Therefore, there was no need to file a post-sentencing motion to preserve that issue, and none was filed. Indeed, the Michigan Supreme Court has held that some sentencing issues may be raised on appeal even if they are never preserved in the trial court. *See People v. Kimble*, 684 N.W.2d 669, 672-74 (Mich. 2004) (holding that some unpreserved sentencing guidelines errors are appealable as "plain error").

But Petitioner's trial counsel completely missed at least four other potential appellate issues: (1) the absence of a factual basis for one of the two counts; (2) the misscoring of Offense Variable ("OV") 9 in the first case; (3) the misscoring of OV 13 in both cases; and (4) the unconstitutionality of the Michigan sentencing guidelines. *See* Pet. Br. 35-37. Not surprisingly, trial counsel, having missed all of these issues when they arose, did not suddenly realize

his mistakes and file a post-sentencing motion after Petitioner had been shipped off to prison.

If Petitioner's requests for appellate counsel had been granted, however, that appellate counsel would have read the record and filed a post-sentencing motion in the trial court to preserve the issues that trial counsel had missed. *See* Mich. Ct. R. 6.311(A) (permitting filing of motion to withdraw plea during time for filing application for leave to appeal); Mich. Ct. R. 6.429(B)(3) (permitting filing of motion for resentencing during time for filing application for leave to appeal).

Alternatively, if the missed issues could not be preserved by a post-sentencing motion, Petitioner's appellate counsel would have moved to create the evidentiary record necessary to establish that trial counsel was ineffective, a claim that generally must be raised on direct appeal in Michigan. Petitioner's trial counsel obviously could not move for and conduct an evidentiary hearing on his own ineffectiveness.

Since Petitioner could not hire an appellate attorney and the trial judge twice refused to appoint one, Petitioner had no hope of receiving meaningful review of his appellate issues. Petitioner's trial attorney did not file a post-sentencing motion because he apparently was still unaware of the issues he had missed (or, if he was aware of them, could not be expected to litigate his own ineffectiveness). Respondent's argument that the theoretical possibility that trial counsel might file such a motion is enough to satisfy *Douglas* is not only contrary to *Bosler*, it is a sham.

Respondent quibbles over the statistics showing the success of plea appeals in Michigan before the statute went into effect but actually undermines its own argument

by doing so. In response to statistics quoted by Petitioner showing that 12 to 47 percent of plea appeals resulted in relief to defendants, Respondent "counters" with statistics still showing that more than 10 percent of plea appeals resulted in relief *in the Michigan Court of Appeals alone*. *See* Resp. Br. 2-3 & n.4 (citing quote from former Chief Judge of Michigan Court of Appeals). Putting aside Respondent's effort to minimize a one-in-ten appellate success rate, Respondent completely misses the point that appellate counsel often obtain relief for plea defendants *in the trial court*. Thus, the 47 percent statistic from the State Appellate Defender Office included not only those plea appeals that resulted in relief in the Michigan Court of Appeals, but the even larger number of cases in which appellate counsel obtained relief for plea defendants by filing post-sentencing motions in the trial court to raise issues that trial counsel had missed.

Respondent's argument about the statistics is also beside the point. Even if most plea appeals were meritless, this Court's cases teach that a state cannot deny indigents the assistance of appellate counsel simply because most of their appeals will turn out to be fruitless. *See Smith v. Robbins*, 528 U.S. 259, 277 (2000) (noting that goal of *Anders v. California*, 386 U.S. 738 (1967) was "to ensure that those indigents whose appeals are not frivolous receive the counsel and merits brief required by *Douglas*"); *see also Smith*, 528 U.S. at 279 n.10 ("Although an indigent whose appeal is frivolous has no right to have an advocate make his case to the appellate court, such an indigent does, in all cases, have the right to have an attorney, zealous for the indigent's interests, evaluate his case and attempt to discern non-frivolous arguments").

In any event, both Petitioner's and Respondent's statistics predate the Michigan Legislature's 1999 adoption of mandatory sentencing guidelines. As Petitioner's experience illustrates, these extraordinarily complex guidelines have greatly increased the number of potentially meritorious sentencing issues in plea cases.

Indeed, Respondent concedes that Petitioner erroneously received 10 points for OV 9 in the first case, Resp. Br. 36, and Respondent never denies that Petitioner also erroneously received 25 points for OV 13 in both cases. *See* Pet. Br. 35. Respondent also points out, correctly, that Prior Record Variable ("PRV") 7 was erroneously scored in Petitioner's favor in the first case. Resp. Br. 37. Thus, at least *four* different sentencing guidelines were scored incorrectly, three in Respondent's favor and one in Petitioner's favor. Had all four of those guidelines been scored correctly, Petitioner's guideline range on the first case would have been 10 to 19 months (he received 24 months), and his guideline range on the second case would have been 12 to 24 months (he received 57 months).

If trial counsel had objected to the misscored guidelines at sentencing, Petitioner would have had to rely entirely on that oral objection to write his application for leave to appeal. Since trial counsel did not object and, unsurprisingly, did not later recognize his mistake, Petitioner did not even have that. To even discover the misscored guidelines, Petitioner would have had to wade through and understand a complicated sentencing guidelines manual that runs to over 170 pages, assuming he somehow could have obtained a copy of that manual. *See* Mich. Sentencing Guidelines Manual (2005), *available at* http://courts.michigan.gov/mji/resources/sentencing-guidelines/sg.htm.

Finally, the large number of sentencing errors committed in Petitioner's case is hardly unique to him or to Michigan. A National Center for State Courts study of five states found that when sentencing issues were raised on appeal, the appellate courts found error 25 percent of the time. National Center for State Courts, *Understanding Reversible Error in Criminal Appeals* 18-19 (1989); *see also* Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 Hastings Const. L.Q. 127, 190-91 (1995) (discussing study finding 24 percent of plea appeals in two appellate courts resulted in defendants receiving relief).

The pre-*Douglas* scheme this Court struck down in *Bosler* was superior to the Michigan scheme not only because it actually required trial counsel to file a post-conviction motion listing all of the appellate issues, an event that rarely occurs in Michigan, but also because trial counsel was required to file the notice of appeal and the appellate court ordered the transcript for the indigent. 386 U.S. at 259. In Michigan, by contrast, the incarcerated indigent is required to initiate her own appeal and order her own transcripts, even though she may be illiterate, mentally ill, and/or unfamiliar with the English language. This Court has recognized that many or most indigents will be unable to overcome these "hopelessly forbidding" procedural obstacles. *See Evitts*, 469 U.S. at 396; *see also People v. Plaza*, 617 N.W.2d 687 (Mich. 2000) (rejecting sentencing appeal by *pro se* indigent because he was unable to obtain his sentencing transcript).

In sum, a post-sentencing motion by trial counsel is not an appeal, first-tier or otherwise. As *Bosler* makes clear, such a motion is certainly not a substitute for a brief by appellate counsel. Nor does such a motion satisfy the other requisites for meaningful access to the appellate

courts, such as transcripts and a written opinion of a first-tier appellate court. *See Evitts,* 469 U.S. at 402 (concluding that *Douglas* governed first-tier appeal where indigent had not previously had benefit of transcript, brief on merits, or written opinion). As Petitioner's case illustrates, a post-sentencing motion by trial counsel is not even a theoretical substitute for first-tier appellate review in Michigan since such motions are not required and are rarely filed.

B. Petitioner's Application for Leave To Appeal Was Not a "Discretionary" Appeal.

In direct contrast to Respondent, Respondent's *amici* forthrightly admit that "[t]he proceeding at issue here certainly is a 'first appeal,'" Brief of *Amici Curiae* Louisiana, et al. ("Louisiana") 12. Like Respondent, however, Louisiana claims that the proceeding is a "discretionary" appeal. *Id.* at 7 n.1. Though Respondent and Louisiana arrive at that conclusion in radically different ways, both are mistaken.

Petitioner's application was denied "for lack of merit in the grounds presented." J.A. 72. Even though the Michigan Court of Appeals has held many, many times that its denials of applications are preclusive decisions on the merits, *see* Pet. Br. 27-28, Respondent insists on characterizing such applications as "discretionary appeals" simply because the Michigan Supreme Court majority labeled it as such in *People v. Bulger*, 614 N.W.2d 103, 104-05 (Mich. 2000). Resp. Br. 32-33.

The first and most fundamental problem with Respondent's argument is that the majority in *Bulger* certainly never held that an application to the Michigan

Court of Appeals is not decided on the merits. Since the majority in *Bulger* never explained why the application was "discretionary," the use of that term was nothing but a labeling exercise. *Evitts* teaches that this Court must look to the function of the appeal, not the label the state applies, to decide whether it falls within the rule of *Douglas*. *See Evitts*, 469 U.S. at 402 (rejecting state effort to label appeal as "conditional" and concluding first-tier error-correcting appeal was governed by *Douglas*).

By contrast to the majority, the dissent in *Bulger* did examine the function of the application for leave to appeal to the Michigan Court of Appeals and concluded, "the function of the Court of Appeals is correcting errors. Thus, the function of that Court is precisely addressed by *Griffin* [*v. Illinois*, 351 U.S. 12 (1956),] and *Douglas*, and conversely not at all by *Ross*." *Bulger*, 614 N.W.2d at 124 (Cavanagh, J., dissenting). Remarkably, Respondent includes a long quote from that *Bulger* dissent that supposedly shows that a Michigan Court of Appeals application is not designed to correct errors, Resp. Br. 33, but omits the very next sentence where Justice Cavanagh explained, "In the North Carolina situation considered in *Ross*, the correctness of the decision below was unmentioned and arguably irrelevant under the governing statute, but the function of our Court of Appeals is reviewing the merits and correcting errors made by the lower courts." *Id.* at 125.

If there were any doubt as to the Michigan Supreme Court's understanding of the function of an application to the Michigan Court of Appeals, that doubt was dispelled in *People v. Walker*, 653 N.W.2d 621 (Mich. 2002). In *Walker*, the Michigan Supreme Court rejected an appeal from a defendant who claimed that he had received ineffective

assistance of appellate counsel because his retained attorney had filed his notice of appeal late and therefore was forced to proceed to the Michigan Court of Appeals by an application for leave to appeal. In rejecting Walker's claim that he had been prejudiced by having to proceed via application, *the author of the Bulger opinion* observed that the Michigan Court of Appeals had denied Walker's application "for lack of merit in the grounds presented" and that this denial proved that the "Court of Appeals reviewed the substantive arguments advanced in the application and concluded that they lacked merit." *Walker*, 653 N.W.2d at 622 (Corrigan, C.J., concurring); *see also id.* at 623 n.5 ("the Court of Appeals plainly considered the merits of defendant's arguments").

Respondent also tries to dismiss the mountain of Michigan Court of Appeals authority holding that its own denials of applications constitute binding decisions on the merits by noting that the three published decisions from the 1980s involved remands and that the decisions ever since have been unpublished. Yet nothing in those three published decisions (*People v. Hayden*, 348 N.W.2d 672, 684 (Mich. Ct. App. 1984); *People v. Douglas*, 332 N.W.2d 521, 523 (Mich. Ct. App. 1983); and *People v. Wiley*, 315 N.W.2d 540, 541 (Mich. Ct. App. 1981)) turned on the fact that the previous orders involved remands. The numerous decisions since the 1980s show that the Michigan Court of Appeals routinely applies *Hayden*, *Douglas*, and *Wiley* to hold that orders denying applications are conclusive decisions on the merits. *See* Pet. Br. at 27-28.

Respondent wants to have it both ways. In this Court, Respondent claims that an order denying an application for lack of merit is not a merits determination. But Respondent gladly regards such orders as merits determinations in

state court because doing so bars defendants from relitigating their claims, and Respondent gladly regards such orders as merits determinations in the lower federal courts because doing so triggers deference on habeas corpus review. *See* Pet. Br. 28-29.

The order of the Michigan Court of Appeals denying Petitioner's application "for lack of merit in the grounds presented" means what it says. An application for leave to appeal from a plea-based conviction is not "discretionary" because it is a first appeal decided on the merits, just like the first-tier appeals in several other states. *See* Pet. Br. 24-27, 30 (describing first-tier appeals by petition or application in six states). Therefore, Michigan is required to provide counsel, just as all of those other states do.

Unlike Respondent, Louisiana reaches the conclusion that the appeal at issue is "discretionary" without any reference to the function of that appeal or the way it is actually decided. Instead, Louisiana reasons that "Michigan law does not regulate when leave to appeal should or must be granted and, therefore, this decision by the Michigan Court of Appeals is, by definition, 'discretionary.'" Louisiana Br. 7 n.1.

Louisiana's argument thus confuses the question of whether Michigan has discretion to set up its appellate system in a different way than it has (which it surely does) with the entirely separate question of what function that appellate system actually performed in Petitioner's case. Only the latter question is relevant to this appeal. The Michigan Court of Appeals reviewed and rejected Petitioner's application on the merits. Therefore, the appeal was not "discretionary."

Having started with the false premise that the appeal at issue in this case is a first-tier *discretionary* appeal, Louisiana proceeds to argue at length that this Court should not "extend" *Douglas* to cover it. In fact, no extension of *Douglas* is required, nor would any extension be required even if the first appeal in Michigan truly were "discretionary."

As Petitioner has already documented, Pet. Br. at 24-25, the appeal at issue in this case is just one of many examples of first-tier screened or expedited appeals designed to reduce the workloads of first-tier appellate courts. With the exception of Michigan, every jurisdiction with a first-tier appeal by application or petition currently provides counsel, and this Court has explicitly endorsed the conclusion of at least one of those states that *Douglas* requires counsel. *See Coleman v. Thompson*, 501 U.S. 722, 742 (1991) (citing approvingly *Cabaniss v. Cunningham*, 143 S.E.2d 911, 913-14 (Va. 1965)). This Court itself reached the conclusion that appellate counsel is required for a first-tier application for leave to appeal in *Ellis v. United States*, 356 U.S. 674 (1958), and in *Smith*, 528 U.S. at 279 & n.10, this Court directly stated that this holding from *Ellis* is part of the constitutional minimum required by *Douglas*.

Even those few jurisdictions that have or had truly "discretionary" first-tier felony appeals have uniformly provided appellate counsel, and no state or federal court since *Douglas*, with the exception of the *Bulger* court, has ever held that counsel is not required for a first-tier felony appeal by application. The state and federal courts have not drawn any distinction for plea appeals, and such a distinction would run afoul of this Court's precedents recognizing that indigents in plea appeals

such as Petitioner cannot reasonably be expected to identify and brief their own issues. *See Roe v. Flores-Ortega*, 528 U.S. 470, 486 (2000); *see also Peguero v. United States*, 526 U.S. 23, 30 (1999) (O'Connor, J., concurring).

In short, Petitioner does not request an "extension" of *Douglas*. He simply wants Michigan to apply *Douglas* to a first-tier felony appeal like every other jurisdiction does and as this Court's precedents dictate.

II. Petitioner Cannot Be Forced, as a Condition of Entering a Plea, To Waive His Right to Appellate Counsel Solely Because of His Indigency, Nor Did He Do So.

Respondent argues that it may constitutionally require indigents, and only indigents, to waive their right to appellate counsel in order to receive the benefits of a plea. Resp. Br. 42-49. In support of this argument, Respondent heavily relies on *Iowa v. Tovar*, 541 U.S. 77 (2004). Resp. Br. 42-46.

Respondent's heavy reliance on *Tovar* is puzzling. The most obvious distinction between *Tovar* and this case is that Mr. Tovar, unlike Petitioner, was *not forced to choose between his right to counsel and the benefits of a guilty plea*. On the contrary, Mr. Tovar chose to plead guilty and be sentenced without counsel despite being repeatedly reminded of his right to counsel. *See id.*, 541 U.S. at 90-91 (noting that Mr. Tovar "waived counsel at his initial appearance, affirmed that he wanted to represent himself at the plea hearing, and declined the court's offer of time to hire an attorney at sentencing") (internal citations and quotation marks omitted).

Tovar would be analogous to the instant case if Mr. Tovar had been indigent and had not been allowed to plead guilty unless he first waived his right to appointed counsel. If Mr. Tovar had been given that ultimatum, his "waiver" of counsel would have been invalid both because the unconstitutional condition would have rendered his decision involuntary and because the forced waiver would have discriminated against the indigent. But that is the choice indigents, and only indigents, face under the Michigan statute.

The other critical distinction between *Tovar* and this case is that there is no doubt that Mr. Tovar understood he was waiving his right to counsel. Petitioner, by contrast, was told that he would receive the assistance of appellate counsel if his case fit within the statutory exceptions, but was never told that he would not receive counsel otherwise. *See* Pet. Br. 46-48.

Respondent also argues that a forced waiver of appellate counsel must be constitutional since the value of the right to counsel Mr. Tovar waived "far surpassed the value of the right that Petitioner waived." Resp. Br. 46. Petitioner certainly does not agree that the right to appellate counsel to help him correct sentencing errors resulting in extra years in prison is any less valuable than the right to counsel at a plea hearing. In any event, Respondent cites no precedent supporting the notion that a forced waiver somehow becomes constitutional if the right waived is deemed less valuable than some other right.

Finally, Respondent argues that Michigan may require a waiver of appellate counsel from the indigent since some lower courts have upheld "appeal waivers" as part of negotiated guilty pleas. Resp. Br. 48-49. Respondent

reasons that if the government may require a defendant to give up his right to appeal altogether in exchange for the benefits of a plea, surely the government may require the defendant to give up only his right to counsel for that appeal.

Once again, Respondent's analogy is inapt and ignores the discriminatory nature of Michigan's scheme. A proper analogy to this case would be if a state were to adopt a statute requiring *only indigents* to agree to appeal waivers as a condition of entering pleas. Thus, whether it is constitutional for a state to require all defendants to waive their right to appeal as a condition of entering pleas (a question the Court has not decided) or whether it is constitutional to extract appeal waivers from some defendants through plea bargaining (another question the Court has not decided) is beside the point. It is plainly unconstitutional to require indigents, and only indigents, to waive their right to appeal in order to enter a plea. As the Court has explained, the Fourteenth Amendment bars states from "grant[ing] appellate review in such a way as to discriminate against some convicted defendants on account of their poverty." *Douglas*, 372 U.S. at 355.

The Michigan statute does exactly that. It requires the poor, and only the poor, to waive any meaningful chance of having sentencing and other errors corrected as a condition of receiving the benefits of a plea, while moneyed defendants receive the benefits of a plea secure in the knowledge that they will obtain meaningful review of any errors that may occur in their plea and sentencing hearings. Therefore, even if Petitioner had waived his right to appellate counsel, which he did not, that forced discriminatory waiver would itself be unconstitutional.

CONCLUSION

The judgment of the Michigan Court of Appeals denying Petitioner's application for leave to appeal should be vacated, and the Michigan Court of Appeals should be ordered to direct the trial court to appoint appellate counsel for Petitioner and to permit Petitioner, with the assistance of appellate counsel, to file a new application for leave to appeal after appellate counsel has had an opportunity to create the evidentiary record necessary for consideration of Petitioner's claims.

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ON WRIT OF CERTIORARI TO THE
MICHIGAN COURT OF APPEALS

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Under Michigan law, a defendant who has been convicted of a criminal offense after pleading guilty or nolo contendere and who wishes to appeal from his conviction or sentence must obtain leave of court to appeal. Mich. Const. art. I, § 20. Michigan law broadly restricts, and in many cases prohibits, the appointment of counsel for indigent defendants applying for leave to appeal. If leave to appeal is granted, then counsel will be appointed for an indigent appellant. Mich. Comp. Laws § 770.3a.

In this brief, the American Bar Association addresses the following question:

Whether Michigan's restrictions on appointment of appellate counsel for indigent criminal defendants who have pleaded guilty or nolo contendere and who, under state law, must apply for leave to appeal from a conviction or sentence comport with the requirements of the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.

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In the Supreme Court of the United States

No. 03-10198

ANTONIO DWAYNE HALBERT,
Petitioner,

v.

MICHIGAN,
Respondent.

ON WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE AMICUS CURIAE[1]

The American Bar Association ("ABA") is a voluntary, national membership organization of the legal profession, dedicated to the promotion of a fair system of justice. The ABA's membership of more than 400,000 spans all 50 States and the District of Columbia and includes prosecutors, public

[1] Pursuant to Rule 37.6, amicus curiae certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk of this Court.

Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

defenders, private attorneys, legislators, and law professors. Since its inception, the ABA has actively promoted improving the administration of justice and increasing the availability and quality of legal counseling to those who need it. In particular, ensuring that all indigent criminal defendants have appointed counsel has been a cornerstone of the ABA's mission, as reflected in its Goal II: "To promote meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition."[2]

The ABA respectfully submits this brief as amicus curiae because this case implicates matters addressed by the Standards for Criminal Justice promulgated by the ABA.[3] *See generally* American Bar Association, *Standards for Criminal Justice* (2d ed. 1980 & Supp. 1986) (*Standards*). The Standards have been developed, refined, and approved over more than thirty years by task forces of the ABA made up of prosecutors, judges, defense lawyers, academics, and others, as well as by the wider and diverse membership of the ABA. Although the Standards do not purport to set forth the ABA's views on the requirements of the Constitution, they do represent the consensus of an experienced group of prosecutors, defense attorneys, and judges on procedures for a "criminal justice system that is fair, balanced, and constitutionally responsive to the needs of today and the future."[4] The Standards have been widely cited, including

[2] *See* American Bar Association, *ABA Policy and Procedures Handbook 2004-2005*, at 1; http://www.abanet.org/about/goals.html.

[3] The ABA filed an amicus curiae brief directed to the same issue in *Kowalski* v. *Tesmer*, 125 S. Ct. 564 (2004), where this Court considered but did not resolve the question presented in this case.

[4] 1 *Standards* xx; *see also* Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251, 251-252 (1974) ("The Standards are a balanced, practical work intended to walk the fine line between the protection of society and the protection of the constitutional rights of the accused individual.").

by this Court, as a guide to criminal justice administration.[5]

Several of the Standards speak directly to the issue in this case and support the position that all criminal defendants should have counsel on appeal. Most directly, Standard 21-3.2(a), entitled "Counsel on appeal," states:

> At the first level of appeal, every convicted defendant, appellant or appellee, should have assistance of counsel. For persons without means to obtain adequate legal representation, counsel should be assigned unless the right to counsel is explicitly waived. Assigned counsel should be compensated from public funds.

4 *Standards* at 21.39.

The Standards also take the position that denial of appointed counsel on first appeals by indigent defendants represents an unsound deterrent to potentially meritorious appeals. Standard 21-2.3(a), entitled "Unacceptable inducements and deterrents to taking appeals," explains that a system of elective appeals "presupposes that the parties with the right to appeal will choose to do so only when they, with advice of counsel, have identified grounds on which substantial argument can be made for favorable action by the appellate court. The system should not contain factors that induce or deter appeals for other reasons." 4 *Standards* at 21.25. Standard 21-2.3(c) gives, as a specific example of an unacceptable deterrent to defendants' appeals, "denial of necessary legal assistance and related services at public expense to appellants who cannot afford adequate legal representation." 4 *Standards* at 21.26.

More generally, the ABA opposes restrictions on the ability of convicted criminal defendants to pursue a first ap-

[5] On several occasions, this Court has found the Standards helpful in ascertaining the proper balance of individual rights and societal interests in the criminal justice system. *See, e.g., Wiggins* v. *Smith*, 539 U.S. 510, 532 (2003); *McKaskle* v. *Wiggins*, 465 U.S. 168, 179 (1984); *Estelle* v. *Williams*, 425 U.S. 501, 504 (1976).

peal of right. The Standards take the position that all convicted criminal defendants, including those who have pleaded guilty, should have the right to one appeal from a conviction.[6] Commentary to the Standards observes that in Anglo-American law, "[t]here is today no dissent from the principle that every convicted defendant should be afforded the opportunity to obtain one judicial review of the conviction by a tribunal other than that in which the defendant was tried." Standard 21-1.1, commentary, 4 *Standards* at 21.6. That principle is recognized in international law as well. *See* International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 14, ¶ 5, 999 U.N.T.S. 171, 177 ("Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.").

Accordingly, the ABA submits this brief in support of the position that a criminal defendant who is required to seek leave to pursue a first appeal from his criminal conviction and who cannot afford appellate counsel should have the assistance of appointed counsel in seeking leave to appeal. Serious problems can arise in the administration of justice when indigent defendants are not assisted by counsel. Those problems are directly implicated in this case. Beyond the obvious harm that would result to indigents who would either have to proceed pro se in seeking leave to appeal or forgo such an opportunity if denied counsel, laws like the

[6] *See* Standard 21-1.1(a), 4 *Standards* at 21.5 ("The possibility of appellate review of trial court judgments should exist for every criminal conviction. It is undesirable to have any class of case in which such trial court determinations are unreviewable."); Standard 21-1.3(a), 4 *Standards* at 21.10-21.11 ("A defendant should have the right to appeal from any final judgment of a trial court adverse to the defendant, including: (i) a conviction followed by a sentence of probation; (ii) a conviction followed by a sentence suspended as to imposition or execution; or (iii) a conviction based upon a plea of guilty or nolo contendere."); Standard 21-2.4, 4 *Standards* at 21.31 ("At the first level of appeal, procedures intended to eliminate frivolous cases from appellate court dockets without decisions on the merits are impractical and unsound.").

Michigan statute at issue in this case could have a seriously detrimental effect on the indigent defense system as a whole. Ordinarily, the mere potential for an appeal with counsel acts as an effective check on the conduct of all actors in the criminal justice system at the trial level. Eliminating the appointment of appellate counsel for indigent defendants who plead guilty may therefore disadvantage indigent defendants at the trial stage as well as the appellate stage. Because the vast majority of convictions in Michigan and elsewhere result from guilty pleas, these concerns are of pervasive importance to the administration of justice in this country, especially if other States follow Michigan's lead in denying appellate counsel.

SUMMARY OF ARGUMENT

Any criminal defendant who wishes to pursue a first appeal from his conviction or sentence should have the assistance of counsel in doing so if he so wishes. If the defendant cannot afford counsel, he should be appointed counsel on appeal. An indigent defendant should have such appointed counsel on appeal even if he pleaded guilty, and even if he must seek and obtain leave to appeal.[7]

A. The assistance of counsel is indispensable to a defendant pursuing a first appeal from a conviction or sentence. Appeals are complex, specialized undertakings. They are no less forbidding to the layperson than a criminal trial. Appeals typically require compliance with procedures that are unfamiliar to nonlawyers: filing a notice of appeal, ordering transcripts, preparing and filing briefs. Court rules (including those governing Michigan's leave-to-appeal procedure) generally require defendants to identify the factual

[7] The Michigan statute under review in this case applies to defendants who have pleaded guilty, guilty but mentally ill, or nolo contendere. *See* Mich. Comp. Laws § 770.3a(1), (2). For ease of reference, this brief refers to all three kinds of pleas as "guilty pleas." Petitioner apparently pleaded nolo contendere rather than guilty in this case because of concerns about the effect of his plea on a separate civil proceeding. *See* JA 18.

and legal bases for their appeal. Legal training and skill are needed to identify potentially meritorious claims of error in the record and to ensure that those points of error are properly preserved for appellate review. An unrepresented defendant who fails to discern a point of error, to describe the error properly, or to articulate the correct doctrinal basis for reversal is likely to lose forever any opportunity for reversal of his conviction or sentence.

In important respects, a defendant's first appeal from a criminal conviction or sentence (even when leave to appeal is required) is quite different from a discretionary second round of review in a state supreme court, where an indigent defendant does not have a constitutional right to appointed counsel. When a defendant pursues a discretionary second round of review, similar to certiorari in this Court, he ordinarily will have the benefit of briefs that have been filed on his behalf in the intermediate appellate court. An unrepresented defendant seeking to pursue a first appeal from a conviction or sentence will typically not have the benefit of such materials, since many matters are resolved in trial courts without detailed briefing. Moreover, a state supreme court exercising discretionary review can usually determine from the face of the opinion of the lower court whether an issue warrants its review. The same is not true of a court reviewing a defendant's first appeal. Thus, without counsel, a defendant is likely to be adrift on appeal.

B. Michigan's decision to deny appointed appellate counsel to indigent defendants who have pleaded guilty lacks a sound basis. Although the State argues that the practice of denying appointed appellate counsel deters meritless appeals, in fact defendants who plead guilty may well have meritorious claims on appeal. For example, the defendant may have pleaded guilty to an offense without having had the nature of the charge accurately explained to him, or the defendant may not have had effective assistance of counsel in the guilty plea process. Without appointed appellate counsel, it is unlikely that such a defendant could obtain relief from such errors in the trial court.

In addition, the Michigan practice inappropriately hobbles defendants who have pleaded guilty in appeals from their sentences. In Michigan, all defendants, whether they have pleaded guilty or were found guilty after trial, are subject to the same sentencing procedures under the State's sentencing guidelines system. There is no justification for deterring indigent defendants who have pleaded guilty, among all defendants, from appealing if the trial court has made an error in construing or applying the guidelines. Moreover, the Michigan guidelines are complex, and opportunities for error abound. A defendant cannot reasonably be expected to discern and pursue claims of sentencing error without the assistance of counsel.

C. The ABA recognizes that States have a legitimate interest in reducing and preventing appellate backlog, but the approach chosen by Michigan is neither necessary nor appropriate to that task. The state courts can provide for disposition of particular cases or classes of cases on separate tracks and can use court staff to identify cases to be so treated. The assistance of counsel, however, is not a luxury that can be dispensed with on appeal any more than at trial. It is, rather, an essential part of a fair system of justice.

ARGUMENT

ANY INDIGENT CRIMINAL DEFENDANT WHO SEEKS TO PURSUE A FIRST APPEAL SHOULD HAVE APPOINTED COUNSEL, EVEN IF THAT DEFENDANT HAS PLEADED GUILTY AND MUST OBTAIN LEAVE TO APPEAL

A. Without The Assistance Of Counsel, An Indigent Defendant Who Wishes To Pursue A First Appeal Will Be Seriously Disadvantaged

1. This Court has long recognized the critical need that indigent defendants have for the assistance of counsel in defending themselves against prosecution by the State. In cases applying the Sixth Amendment, which guarantees a defendant the assistance of counsel at trial, this Court has explained that "[t]he right [of a defendant] to be heard would be, in many cases, of little avail if it did not compre-

hend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He requires the guiding hand of counsel at every step in the proceedings against him." *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932); *see also Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963) ("[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."). The Court's decisions under the Sixth Amendment reflect "the recognition and awareness that an unaided layman ha[s] little skill in arguing the law or in coping with an intricate procedural system." *United States* v. *Ash*, 413 U.S. 300, 307 (1973).

The same concerns have led this Court to identify a similar right under the Due Process and Equal Protection Clauses to the assistance of counsel on a first appeal. As the Court has observed, "[t]o prosecute the appeal, a criminal appellant must face an adversary proceeding that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant—like an unrepresented defendant at trial—is unable to protect the vital interests at stake." *Evitts* v. *Lucey*, 469 U.S. 387, 396 (1985). Recognizing that nonlawyers generally lack the legal skills and training needed to discern the legally and factually promising bases for appeal, the Court has emphasized that "lawyers are 'necessities, not luxuries' in our adversarial system of justice . . . . The defendant's liberty depends on his ability to present his case in the face of 'the intricacies of the law and the advocacy of the public prosecutor.' " *Id.* at 394 (quoting *Gideon*, 372 U.S. at 344, and *Ash*, 413 U.S. at 309).[8]

[8] Indigent defendants also need the advice of counsel in deciding *whether* to appeal. In many cases, it may not be in the defendant's best interest to appeal, but a defendant may not recognize that point without the advice of an attorney. If a defendant succeeds in having his plea or sentence overturned on appeal, he may be subject to a longer sentence after retrial, replea, or resentencing. *See Alabama* v. *Smith*, 490 U.S. 794 (1989). The defendant may not recognize this risk and may not understand that additional, potentially detrimental factors bearing on his sentence may be taken into account on resentencing (such as additional convictions that became final, his record in prison, or errors that were overlooked by the original sentencing court).

An unrepresented defendant faces challenges on appeal that are equally as daunting as those at a trial. For example, anyone pursuing an appeal typically must file a notice of appeal in the proper form and in the proper court, designate the record for appeal, order transcripts, and specify the points to be raised on appeal. In addition, in Michigan, a defendant who must apply for leave to appeal must state the factual and legal basis for any claim of error to be raised on appeal, which presumably requires specific references to the record if such claims are to appear meritorious to the reviewing court. *See* JA 68-71. All of this must be done within strict deadlines and while the defendant is incarcerated (as is generally the case with defendants who have pleaded guilty). In many cases, the application for leave to appeal may have to be filed before the complete record on appeal will have been prepared. *See* MCR 7.205 (directing that application for leave to appeal be filed within 21 days after judgment, but noting circumstances in which transcript may not yet be available). Thus, an indigent defendant cannot assume that the record by itself will be sufficient to allow an appellate court to discern the presence of error.[9]

[9] In this case, for example, it appears that the transcript of petitioner's plea hearing was not prepared until more than seven months after sentencing (JA 3-5)—long after the 21-day deadline for filing an application for leave to appeal (MCR 7.205(A)). Thus, the petitioner in this case was effectively forced to file a late application for leave to appeal in order to explain the basis for his claim of error to the appellate court. Convicted defendants in Michigan are allowed to file late applications for leave to appeal within 12 months after the conviction is entered, but the court of appeals must consider the reason for and length of the delay in deciding whether to grant leave to appeal. MCR 7.205(E)(1). Thus, even if the defendant could not apply for leave to appeal within 21 days of his conviction because his transcript had not been prepared, the court of appeals might deny his application for leave to appeal because it concluded that he

Lacking the advice and assistance of counsel, an indigent defendant would be seriously disadvantaged in preparing an application for leave to appeal. For example, a defendant who wished to challenge his guilty plea on the ground that his trial counsel or the trial court had erred in explaining the nature of the charge against him would surely need the assistance of appellate counsel to explain the deficiency, especially if the error involved misconstruction of the elements of the offense. *Cf. Bousley* v. *United States*, 523 U.S. 614, 618 (1998) (guilty plea may be involuntary if court and counsel err in explaining elements of the offense to the defendant). Similarly, a defendant would need the assistance of appellate counsel to understand how to raise a claim of ineffective assistance of trial-level counsel, which under Michigan law must be raised on direct appeal, absent good cause. *See People* v. *Reed*, 499 N.W.2d 441, 445 & n.4 (Mich. Ct. App. 1993), *aff'd*, 535 N.W.2d 496 (Mich. 1995). And most unrepresented indigent defendants could hardly be expected to mount a successful challenge to a mistake by the trial court in construing and applying the highly technical Michigan sentencing guidelines, or to challenge the validity of those guidelines under *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004).

If an unrepresented defendant failed to articulate the basis for a challenge to his conviction or sentence in his application for leave to appeal, he would likely lose any opportunity to raise that issue forever in either the state or federal courts.[10] Thus, as this Court has recognized, "the services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits." *Evitts*, 469 U.S. at 393.

Moreover, even if the unrepresented defendant noted a claim of error and stated the facts supporting that claim, that might not be sufficient to preserve his opportunity for further review, especially for a federal claim. Under this Court's decisions, for a defendant to preserve a federal claim for further review in this Court (or on federal habeas corpus), it is not sufficient for the defendant to note a general claim of error (such as claiming "ineffective assistance of counsel"). Rather, the defendant must identify the specific doctrinal basis for his claim and must also make clear that his claim is a *federal* one—even if he clearly and unmistakably raises a state claim, and even if the federal and state doctrines are similar. *See, e.g.*, *Howell* v. *Mississippi*, 125 S. Ct. 856 (2005).[11]

It is implausible that an unrepresented, indigent defendant would understand that he must specifically identify federal law as the basis of its claim.[12] Nor could such a de-

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had waited too long after the transcript was ready before filing his application.

[10] *See, e.g.*, *People* v. *Miller*, 604 N.W.2d 781, 783 (Mich. Ct. App. 1999) (court will decline review of issue on direct appeal when the issue was not raised in questions presented); MCR 6.508(D)(3) (court may not grant postconviction relief for grounds that could have been raised on appeal, absent good cause and prejudice); *Howell* v. *Mississippi*, 125 S. Ct. 856 (2005) (claim not specifically presented to state courts may not raised for first time in United State Supreme Court); *Wainwright* v. *Sykes*, 433 U.S. 72 (1977) (claim not timely raised in state court may not be raised on federal habeas corpus absent showing of cause and prejudice).

[11] *See also Baldwin* v. *Reese*, 124 S. Ct. 1347, 1350-1351 (2004) (mere reference to "ineffective assistance" of "appellate court counsel" in state court filing was insufficient to preserve federal ineffective-assistance claim); *Gray* v. *Netherland*, 518 U.S. 152, 163 (1996) ("We have also indicated that it is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the substance of such a claim to a state court." (internal quotation marks omitted)); *Anderson* v. *Harless*, 459 U.S. 4, 6 (1982) ("It is not enough that all the facts necessary to support the federal claim were before the state courts, . . . or that a somewhat similar state-law claim was made . . . ." (citations and internal quotation marks omitted)).

[12] Michigan requires that a defendant seeking leave to appeal complete a form stating the factual and legal basis for any claim of error. This form—which the State has defended as nontechnical and easily understood—instructs defendants that they must "[s]tate the issues that you want the Court of Appeals to review, such as how you believe the circuit court erred in accepting your plea or imposing the sentence," and that

fendant be expected to appreciate the doctrinal nuances underlying potential claims. Consider, as an example, a defendant who entered a guilty plea without the benefit of an explanation of the nature of the charge against him, or without an understanding of the constitutional rights that he waived by pleading guilty.[13] That defendant might believe that he had a basis for some kind of challenge to the validity of his guilty plea, but not recognize that his claim implicated the federal Constitution. But to preserve the federal claim, it would be insufficient for the defendant simply to state that his plea was not knowing or voluntary. The defendant would also have to invoke the correct specific provision of the federal Constitution and, indeed, would have to invoke the correct federal doctrine to preserve his challenge.

It is unrealistic to expect an indigent unrepresented defendant to navigate these shoals with the skill needed to make and to preserve potentially meritorious challenges to his conviction or sentence.[14] Moreover, the wrong guess

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they must "state the law that supports your position and explain how the law applies to the facts of your case." JA 68-69. The form, however, does not counsel defendants that they must specify whether their claims arise under state or federal law, or both. An unrepresented defendant might believe that his guilty plea or sentence was invalid, but might not know that his claim implicated both state and federal law. Even if he did have such unexpected legal acuity, the defendant might not understand that he should specify whether his claim arose under state or federal law, or both. In this regard, the form's nontechnical nature is a vice rather than a virtue: it does not sufficiently warn defendants that they must carefully identify the precise doctrinal bases for their claims, lest they lose forever the right to pursue those claims.

[13] *See Bousley*, 523 U.S. at 618 (holding that guilty plea is not voluntary if defendant does not recognize true nature of charges against him); *Henderson* v. *Morgan*, 426 U.S. 637, 647 (1976) (same).

[14] For example, a nonlawyer would likely fail to grasp the distinction between arguing that his guilty plea violated the Due Process Clause of the Fourteenth Amendment because he did not receive adequate notice of the charges against him (*see Henderson* v. *Morgan*, 426 U.S. at 644-646 & n.13) and arguing that his plea violated the Due Process Clause because he did not validly waive his constitutional trial rights (*see Boykin* v. *Alabama*, 395 U.S. 238, 242-243 (1969)).

about the specific doctrinal basis for the defendant's challenge could be catastrophic, for it could bar the defendant from pursuing the most promising avenue for his claim. *Compare Holland* v. *Illinois*, 493 U.S. 474, 478, 487 & n.3 (1990) (rejecting white defendant's claim that use of peremptory challenges to strike black jurors violates "fair cross-section" requirement of Sixth Amendment, and declining to reach equal protection claim, which was deemed waived), *with Powers* v. *Ohio*, 499 U.S. 400 (1991) (sustaining similar claim under Equal Protection Clause).

To be sure, the Michigan courts *might* perceive merit in an unrepresented defendant's application for leave to appeal and appoint counsel for plenary briefing. But the far more likely eventuality is that the unrepresented defendant will fail to make his claim with sufficient clarity and precision, the Michigan courts will overlook claims with potential merit, and those claims will be lost forever. Thus, "[t]he indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal." *Douglas* v. *California*, 372 U.S. 353, 358 (1963).

2. *Ross* v. *Moffitt*, 417 U.S. 600 (1974), does not control this case. In *Ross*, this Court ruled that the Fourteenth Amendment did not require that defendants who had already pursued an appeal of their convictions to an intermediate state court of appeals, in which they had had the assistance of appointed counsel, also be appointed counsel to pursue a petition for further discretionary review either in the state supreme court or in this Court. *See id.* at 610-619.

Petitions for discretionary review to a state supreme court in a three-tier court system (as in Michigan) present entirely different considerations from those raised by first appeals, including first appeals where the defendant must seek leave to appeal. As this Court stressed in *Ross*, a defendant who is seeking a discretionary second round of appellate review of his conviction "will have, at the very least, . . . a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the

Court of Appeals disposing of his case." 417 U.S. at 615. Thus, to apprise a state supreme court (such as the Michigan Supreme Court) of the substance of his claims, the defendant could simply reproduce the brief that was filed on his behalf on the first appeal. Indeed, given that the customary practice in state supreme courts, as in this Court, is not to entertain claims of error that were not specifically raised in or decided by the court from which review is sought, a defendant generally could not go beyond what was filed on his behalf in the intermediate court of appeals or decided by that court on the face of its opinion.[15]

By contrast, when a defendant must seek leave to pursue a first appeal, there often will be no such clean record from the trial court for the appellate court to review. Briefs may well not have been filed in the trial court on the pertinent issues. The relevant motion or objection may have been made orally during a hearing, without citation of case law.[16] Even when the claim of error was raised by written motion in the trial court, that motion is likely to have been much less developed than an appellate brief, which lawyers ordinarily have several weeks to prepare. In addition, trial courts often make oral findings or observations that go beyond the points directly addressed by parties in their written motions. That is particularly true of sentencing, where the trial court may make findings on issues that were not specifically addressed in the parties' sentencing memoranda, if indeed any were filed.

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[15] *See Illinois* v. *Gates*, 462 U.S. 213, 217-224 (1983); *Booth Newspapers, Inc.* v. *University of Mich. Bd. of Regents*, 507 N.W.2d 422, 432 & n.23 (Mich. 1993).

[16] In this case, for example, the only substantive sentencing issue addressed by the parties and the trial court at the sentencing hearing was the question of consecutive or concurrent sentencing, the resolution of which had an enormous impact for petitioner's sentence. The parties do not appear to have made written submissions on that question, and the court gave no explanation on the record for its decision to order consecutive sentences. JA 35.

Thus, unlike an unrepresented defendant who has already had one appeal and who is seeking a further round of review, an unrepresented defendant pursuing a first appeal generally will not have the option of simply relying on what was previously filed by a lawyer on his behalf. A defendant pursuing a first appeal needs the assistance of a lawyer to organize the record, to identify the crucial points in the transcript or written record where the claimed error was committed, and to explain which legal doctrines are implicated by the assignments of error. "There can ~~hardly be~~ any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review." *Jones* v. *Barnes*, 463 U.S. 745, 752 (1983); *see Douglas*, 372 U.S. at 358 (stressing that an appealing defendant needs "the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf").

3. The purposes served by first appeals are also quite different from those served by discretionary review proceedings at a higher level. The central purpose of first appeals is correction of error in individual cases. Although appeals also often serve the useful function of clarifying legal principles, that is not an essential component of appeals, and most appellate courts are familiar with appeals that raise issues of little interest to anyone other than the parties to the case. That is true, moreover, whether or not the first appeal is of right. Even in Michigan's system under which leave to appeal is required for defendants who have pleaded guilty, the defendant need not show, and the court need not conclude, that the issue on appeal is of broad legal significance for leave to be granted.

By contrast, the central purpose of discretionary review in the Michigan Supreme Court—as with certiorari in this Court—is to clarify important legal principles of significant public interest. *See* MCR 7.302(B) (setting forth grounds for leave to appeal to Michigan Supreme Court); *cf.* Sup. Ct. R. 10; *Ross*, 417 U.S. at 615 (discussing similar practice of North Carolina Supreme Court). Especially when lower

courts have reached differing conclusions, a state supreme court (and this Court) may grant discretionary review even when the court believes that the lower court's decision is correct. *See id.* at 616-617 ("This Court's review . . . depends on numerous factors other than the perceived correctness of the judgment we are asked to review."). In many cases, a state supreme court exercising this discretionary, law-clarifying function can determine from the face of the lower court's opinion (or from a dissent) whether the legal issues warrant plenary consideration. Thus, as this Court observed in *Ross*, while an attorney would certainly be "helpful" to a defendant pursuing a second or third round of appellate review of his conviction, counsel's function at those stages is not so indispensable as it is on a first appeal, where an unrepresented defendant is likely to be adrift.

B. There Is No Basis For Denying Assistance Of Counsel To Indigent Defendants Seeking Leave To Appeal Convictions And Sentences Resulting From Guilty Pleas

1. The State has suggested that defendants who plead guilty are unlikely to have even potentially meritorious claims for appeal, and so nothing of significance is lost by deterring indigent defendants from appealing by denying them appointed counsel when they seek leave to appeal.[17] That submission is seriously incomplete. To be sure, a guilty plea operates as a waiver of many possible claims of error, including many constitutional claims. *See Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973); *McMann* v. *Richardson*, 397 U.S. 759, 770 (1970). Nonetheless, a defendant who pleads guilty can challenge his conviction or sentence on appeal in at least two important circumstances.

First, a defendant may claim that the conviction resulted from a defect in the plea process itself—for example, because the guilty plea was not knowing or voluntary, or be-

[17] *See* Pet. Br. 32-34, *Tesmer* v. *Kowalski*, 125 S. Ct. 564 (2004) (No. 03-407).

cause the trial court failed to follow the required procedures for taking a guilty plea, or because the defendant received in effective assistance of counsel in the guilty plea process. *See In re Guilty Plea Cases*, 235 N.W.2d 132 (Mich. 1975) (outlining circumstances in which failure to adhere to plea procedures requires reversal); *People* v. *Rostick*, No. 241916, 2004 WL 67551 (Mich. Ct. App. Jan. 15, 2004) (per curiam) (reversing conviction based on nolo contendere plea for failure to establish factual basis after initially denying leave to appeal).

Second, in Michigan's sentencing system, which resembles the federal sentencing guidelines system in important respects, a defendant convicted on a guilty plea may appeal an error in sentencing. *See People* v. *Hegwood*, 636 N.W.2d 127 (Mich. 2001) (per curiam); *People* v. *Miller*, No. 240613, 2003 WL 22442992, at *1-2 (Mich. Ct. App. Oct. 28, 2003) (per curiam) (finding scoring error and remanding for resentencing in case where defendant pled guilty). Defendants who have pleaded guilty presumably may also raise a challenge to the validity of the Michigan sentencing guidelines system under *Blakely*.[18]

[18] The validity of Michigan's guidelines system after *Blakely* remains unclear. In *People* v. *Claypool*, 684 N.W.2d 278, 286 n.14 (Mich. 2004), the Michigan Supreme Court remarked in *dicta* that the guidelines were unaffected by *Blakely*. The dissenting opinion in *Blakely* itself suggested otherwise, however. *See* 124 S. Ct. at 2549 (O'Connor, J., dissenting). The uncertainty results from the fact that the Michigan guidelines system, though similar to the federal system in its complexity, is different in that judges in Michigan sentence convicted defendants to a sentencing *range*—the bottom level of the range being established by application of the guidelines (which themselves yield a range, within which the judge determines the defendant's minimum sentence) and the top level of the range being set by statute. *See Claypool*, 684 N.W.2d at 286 n.14; Mich. Comp. Laws § 769.8(1). Thus, in this case, petitioner was sentenced to ranges of 24 months to 15 years and 57 months to 15 years for his two convictions (to run consecutively). JA 38, 41. The Michigan Supreme Court suggested in *Claypool* that the Michigan guidelines system resembles a mandatory minimum sentencing structure, such as that upheld in *Harris* v. *United States*, 536 U.S. 545 (2002). The Michigan guidelines are not identical to the sentencing law upheld in *Harris*, however. Under the

Defendants who have pleaded guilty, who wish to pursue such claims, and who can afford retained counsel on appeal will have the assistance of counsel in preparing their applications for leave to appeal. Yet the State denies *indigent* defendants the right to the assistance of counsel in seeking leave to appeal on the very same grounds. For example, an indigent defendant seeking leave to appeal because his guilty plea was involuntary would not fall within any of the categories of persons for whom counsel may be appointed, even in the court's discretion. And an indigent defendant who has pleaded guilty and seeks leave to appeal his sentence because a scoring error by the trial court placed his sentence above the properly applicable guidelines range would also have no right to counsel, but could only have one appointed in the court's discretion. *See* Mich. Comp. Laws § 770.3a(3).[19] Thus, the indigent defendant, unaided by counsel, would have to prove to the court of appeals that his case

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Michigan system, judicial factfinding can result in the elevation of the defendant's sentence, which is expressed as a range (e.g., 57 months to 15 years), above the level that would have otherwise been permissible based solely on the jury verdict or facts admitted by the defendant absent the fact found by the judge (e.g., a sentence of 18 months to 15 years). Needless to say, it is highly unlikely that an unrepresented, indigent defendant would have the tools to develop the complex argument that would be needed to persuade the Michigan Court of Appeals not to follow the Michigan Supreme Court's dictum in *Claypool*, or to preserve that claim of error for further review in the Michigan Supreme Court or this Court.

[19] The Michigan law under review does not directly address whether counsel may, in the court's discretion, be appointed when a convicted defendant challenges the constitutionality of his sentence under *Blakely*. Conceivably, such a challenge might fall within Mich. Comp. Laws § 770.3a(3), which authorizes appointment of counsel in the court's discretion for a challenge to an alleged "improper scoring of an offense variable or a prior record variable," where the defendant argues that the sentence imposed represents an upward departure from the upper limit of the appropriate minimum sentencing range. What is clear is that the Michigan law under review does *not* grant a *right* to appointed appellate counsel for any challenge to a sentence based on *Blakely*.

was sufficiently meritorious to warrant a plenary appeal and the appointment of counsel.[20]

2. Michigan's determination that indigent defendants who have pleaded guilty should not have the right to assistance of counsel when seeking leave to appeal raises serious concerns about the fair administration of justice. It is particularly troubling that Michigan prohibits appointment of

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[20] The court is barred from appointing appellate counsel for a defendant seeking leave to appeal his sentence if the defendant did not properly preserve his sentencing issue for appeal. *See* Mich. Comp. Laws § 770.3a(3). Of course, the question whether a claim of error was properly preserved is itself often not simple. *See, e.g.*, *People* v. *Conway*, No. 246026, 2004 WL 787179, at *2 (Mich. Ct. App. Apr. 13, 2004) (per curiam) (assuming error was preserved in complicated circumstances), *appeal denied*, 688 N.W.2d 82 (Mich. 2004) (table). *Cf. Anderson*, 459 U.S. at 8 (Stevens, J., dissenting) ("Few issues consume as much of the scarce time of federal judges as the question whether a state prisoner adequately exhausted his state remedies before filing a petition for a federal writ of habeas corpus."). A lawyer, familiar with court transcripts, is far more likely to be able to persuade a court that a claim of error was properly preserved than an unrepresented defendant, who may not even have the pertinent transcripts when preparing his application for leave to appeal (*see supra* p. 9 & n.9).

Moreover, even when a claim has not been preserved in the trial court, Michigan law recognizes that a defendant can obtain appellate relief in two circumstances. First, the defendant can obtain plain-error review. *See People* v. *Kimble*, 684 N.W.2d 669, 674 (Mich. 2004) (error in guidelines scoring was plain error). Second, the Michigan Court of Appeals has also been willing to review sentencing errors that a defendant failed to properly preserve when the defendant presents the issue in the form of an ineffective-assistance-of-counsel claim. *See, e.g.*, *People* v. *Wilson*, 652 N.W.2d 488, 490 (Mich. Ct. App. 2002) (per curiam) (holding that consideration of sentencing error was barred for lack of preservation, but nevertheless reviewing an ineffective-assistance-of-counsel claim regarding the same sentencing error); *People* v. *Dupuis*, Nos. 239315, 239316, 2003 WL 22956389, at *3 (Mich. Ct. App. Dec. 16, 2003) (per curiam) (same, and finding ineffective assistance and remanding for resentencing). Without the assistance of counsel, however, a defendant would be seriously disadvantaged in presenting such claims in a persuasive manner. Yet these are the cases where the indigent defendant may need appellate counsel the most—to review the sentencing record and present any previously unpreserved sentencing errors for the first time on appeal.

counsel when an indigent defendant seeks leave to persuade an appellate court that his guilty plea was constitutionally defective because it was involuntary or not made with the necessary understanding. An indigent defendant could forever lose the right to relief from even an involuntary guilty plea if he were deterred from seeking leave to appeal because he lacked the right to assistance of counsel, or if he did seek leave to appeal but failed to perceive and preserve the proper doctrinal basis for his appeal.[21]

Similarly, a defendant who failed to appeal based on nonconstitutional errors in the guilty plea process—such as the trial judge's failure to establish on the record that there was a proper factual basis for the plea—would forever lose the right to relief from his invalid plea. Michigan follows the rule of *United States* v. *Timmreck*, 441 U.S. 780 (1979), that a nonconstitutional error in the taking of a guilty plea, even if it might provide a basis for reversal on direct appeal, is not cognizable on collateral review (at least absent a showing of a fundamental miscarriage of justice). *See People* v. *Ward*, 594 N.W.2d 47, 51-52 (Mich. 1999) (per curiam); *People* v. *Ingram*, 484 N.W.2d 241, 243 (Mich. 1992). But that is exactly the kind of error that a defendant is likely not to perceive without help from his trial counsel or the trial judge—both of whom are likely to have overlooked the error themselves (or else the error would have been rectified).

Also troubling is Michigan's broad restriction on appointment of counsel for defendants who seek to appeal an allegedly erroneous sentence. As noted above, the Michigan courts follow a sentencing guidelines system, in which appeals from sentences are a routine and important part. The Michigan guidelines system applies both to defendants who

[21] This Court has held that a defendant who does not properly raise a constitutional challenge to the validity of his guilty plea on direct appeal generally loses the right to raise such a challenge on collateral habeas corpus review (subject only to a very narrow exception if the defendant can show cause and prejudice for his failure to raise the claim on appeal). *See Bousley*, 523 U.S. at 621-622.

plead guilty and those who are convicted after full trials. There is no particular reason to believe that courts will make fewer sentencing errors in guilty plea cases as a class than in trial cases. Thus, there does not appear to be any justification for deterring only defendants who have pleaded guilty from appealing from their sentences. Although a defendant's guilty plea does waive numerous claims of error based on incidents antecedent to the defendant's plea, it does not follow (and this Court has never held) that a guilty plea necessarily waives *any* claim of error arising out of sentencing, especially in a sentencing guidelines system like that in Michigan. Thus, whatever might be said about the effect of a guilty plea in waiving claims of error concerning the defendant's guilt, there is no basis to conclude that such a plea has any significance for a defendant's right to appeal his sentence.

Moreover, the sentencing guidelines system in Michigan is complex—no less complex than the federal system (whether before or after *United States* v. *Booker*, 125 S. Ct. 738 (2005)). Under the Michigan system, a defendant's sentence is determined in the following manner. First, based on the particular offense, the court must "score" the statutorily specified "offense variables" and arrive at an "offense variable level" (which is analogous to the offense level under the federal sentencing guidelines). *See* Mich. Comp. Laws §§ 777.21(1)(a), 777.31. Second, the court must score all of the statutorily specified "prior record variables" to arrive at the defendant's "prior record variable level" (analogous to the criminal history category under the federal sentencing guidelines). *See id.* §§ 777.21(1)(b), 777.51. The court then must consult a sentencing grid applicable to the specific offense class and determine the "minimum sentence range"—but in contrast to the federal system, the Michigan guidelines have numerous sentencing grids, each corresponding to one of nine different offense classes. *See id.* §§ 777.21(1)(c), 777.61-777.69. Finally, the court must impose a sentence, expressed as a sentencing range with a minimum and maximum, with the minimum drawn from the applicable guide-

lines range and the maximum set by statute. *See id.* § 769.34(2).[22]

Even putting aside the difficult question whether this entire system is consistent with *Blakely* and *Booker*—on which a defendant appealing his sentence would surely need the assistance of counsel (*see supra*, p. 17 n.18)—it is clear that the opportunities for legal and factual error by trial courts in implementation of the Michigan sentencing guidelines are numerous, as the federal courts have discovered in their system. Even in cases involving guilty pleas, the Michigan trial courts do sometimes misapply the guidelines, requiring the Michigan Court of Appeals to remand cases for resentencing. *See, e.g., People* v. *Cook*, No. 245018, 2004 WL 576251, at *1 (Mich. Ct. App. Mar. 23, 2004) (mem.) (remanding when trial court erroneously sentenced defendant to prison time rather than probation); *Miller*, 2003 WL 22442992, at *1-2 (remanding because trial counsel rendered ineffective assistance in failing to object to scoring error affecting defendant's sentence). But if the Michigan sentencing guidelines occasionally confound even trial courts, they are hardly likely to be pellucid to indigent, unrepresented defendants. In short, legal skill is necessary to effective comprehension of the system and indispensable to pursuing a successful appeal from a sentencing error. Thus, a defendant who has pleaded guilty and who wishes to appeal his sentence is likely to be seriously disadvantaged if he lacks counsel to prepare his application for leave to appeal.

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[22] As the Michigan Supreme Court explained in *People* v. *Babcock*, 666 N.W.2d 231, 240-241 (2003):

> Under the guidelines, offense and prior record variables are scored to determine the appropriate sentence range. Offense variables take into account the severity of the criminal offense, while prior record variables take into account the offender's criminal history. Therefore, the appropriate sentence range is determined by reference to the principle of proportionality; it is a function of the seriousness of the crime and of the defendant's criminal history.

3. No state interest suffices to justify a situation, which Michigan has put in place, whereby nonindigent defendants who have pleaded guilty may seek leave to appeal with the assistance of counsel, but indigent defendants may not. There is no basis for believing that indigent defendants as a rule are less likely to have meritorious issues on appeal than nonindigent defendants. For example, there is no reason to believe that indigent defendants are less likely than nonindigent defendants to plead guilty involuntarily or unknowingly, or that trial courts are less likely to commit errors in applying the Michigan sentencing guidelines to indigent defendants than to nonindigents. But whereas a defendant who can afford counsel will have expert assistance in (for example) explicating the particular aspect of the sentencing guidelines at issue in the appeal, the indigent defendant will have no such help. "[O]nly the barren record speaks for the indigent, and, unless the printed pages show that an injustice has been committed, he is forced to go without a champion on appeal." *Douglas*, 372 U.S. at 356.

As a practical matter, therefore, a defendant who can afford counsel will stand a much better chance of persuading the Michigan courts that his claims of error have sufficient merit that leave to appeal should be granted. Once granted leave to appeal, the defendant with means will then proceed to a plenary appeal, assisted by counsel, whereas the indigent defendant, denied leave to proceed further, will have no appeal. As in *Douglas*, therefore, "the discrimination is not between 'possibly good and obviously bad cases,' but between cases where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot." 372 U.S. at 357. Such discrimination is contrary to basic principles of equality and fairness in the Fourteenth Amendment.

C. Michigan's Interests In Discouraging Meritless Appeals And Reducing Appellate Backlog Are Insufficient To Sustain The Challenged Statute

The State has suggested that its practice of requiring defendants who have pleaded guilty to seek leave to appeal

is justified by its interests in discouraging meritless appeals and reducing the backlog in its courts of appeals.[23] The issue before the Court in this case, however, is not whether the State may require any particular class of appealing defendants to seek leave to appeal. As a matter of policy, the ABA opposes the leave-to-appeal device as a method of deterring frivolous appeals and reducing appellate caseload (*see supra* pp. 3-4 & n.6), but the propriety of that procedure is not at issue here. Rather, the question is whether indigent defendants are entitled to the assistance of counsel in passing that threshold barrier to their ability to pursue any appeal at all.

If the leave-to-appeal procedure operates as intended, a court that reviews applications for leave to appeal would be assisted, not harmed, by counsel's skill in identifying the issues that would have potential merit on appeal. If a defendant is represented by appointed counsel on an application for leave to appeal, that counsel will be constrained by ethical and professional norms as well as court rules from seeking leave to pursue meritless issues. *See* ABA Model R. Prof'l Conduct 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."); Mich. R. Prof'l Conduct 3.1 (similar); MCR 7.216(C)(1)(a) (authorizing sanctions when "the appeal was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal"). Even among nonfrivolous arguments, competent appointed counsel is likely to pursue only the most promising claims on appeal (*see Jones* v. *Barnes*, 463 U.S. at 752-753)—unlike unrepresented appellants, who are unlikely to have the legal skill to sift promising from unpromising arguments. Appointment of counsel therefore *advances* the State's interest in discouraging meritless appeals.[24]

[23] *See* Pet. Br. 3-4, *Tesmer* v. *Kowalski*, 125 S. Ct. 564 (2004) (No. 03-407).

The ABA recognizes that backlog is a serious problem in many state appellate court systems. State courts have tools to address that problem without sacrificing fundamental requirements of a fair system of justice—including the requirement that a criminal defendant have the assistance of counsel on appeal. For example, the Criminal Justice Standards encourage appellate courts "to select, among diverse procedural paths for hearing and submission of cases to the appellate court and for disposition of cases by the court, the path that is most appropriate for each case." Standard 21-3.1(b)(iii), 4 *Standards* at 21.37. The Standards also recommend that appellate courts use court staff in "evaluating new appeals and recommending to the court the procedural path appropriate to each." Standard 21-3.4(c)(1), 4 *Standards* at 21.47-21.48. Many States also authorize appellate courts to identify cases that are appropriate for decision without oral argument or for summary disposition. If instituted properly, such procedures can ensure that every appealing defendant has the opportunity to make his best claim for reversal and the right to have that claim reviewed. What is not consistent with a fair system of justice, however, is for the State to force an indigent criminal defendant to undertake the burden of appeal without the help of counsel.

CONCLUSION

The judgment of the Michigan Court of Appeals should be reversed.

Respectfully submitted,

[24] The State may also adopt appropriate procedures that allow appellate counsel to withdraw when counsel perceives no meritorious claims on appeal, while safeguarding the appealing defendant's right to counsel. *See Smith* v. *Robbins*, 528 U.S. 259, 264-265 (2000); *Anders* v. *California*, 386 U.S. 738, 744 (1967).

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IN THE

Supreme Court of the United States

ANTONIO DWAYNE HALBERT,

Petitioner,

v.

MICHIGAN,

Respondent.

ON WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF OF THE STATES OF LOUISIANA, ALABAMA, COLORADO, HAWAI'I, INDIANA, MARYLAND, MISSISSIPPI, MONTANA, NEVADA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Does the Equal Protection Clause of the Fourteenth Amendment impose on the States the burden to appoint appellate counsel for an indigent criminal defendant who has no right to an appeal on the merits but who nonetheless applies for discretionary leave to appeal the conviction and/or sentence in an intermediate state appellate court?

2. Assuming petitioner has such a right, do the States have discretion to require that a defendant waive it as a condition of being allowed to enter a guilty plea rather than facing trial?

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INTERESTS OF AMICI CURIAE

Petitioner's arguments represent a fundamental challenge to the ability of all States to organize and manage their criminal justice systems as their citizens think best. Here, in reaction to the escalating costs imposed by the state's system of state-paid counsel, the Michigan legislature passed a statute denying state-paid counsel when a criminal defendant has pleaded guilty but wishes to seek a discretionary appeal of his sentence. The state's statute, moreover, requires that a criminal defendant waive the right to state-paid counsel as a condition of the guilty plea. Petitioner argues that this statutory scheme is unconstitutional because, according to petitioner, the equal protection component of the Fourteenth Amendment creates an *unwaivable* right to state-paid counsel for discretionary appeals brought by indigent defendants. Adoption of petitioner's argument thus poses a threat to a fundamental aspect of state sovereignty – a state's ability to manage the costs of its criminal justice system – even as it would create substantial practical problems for Michigan and other States that require criminal defendants to waive various rights as a condition of pleading guilty.

Although none of the *amici* States has adopted a statutory scheme identical to that at issue here, these States have an interest in the broad constitutional question of what measures they may take to further their strong interest in the finality of guilty pleas and in limiting the costs created by their criminal justice systems. *See United States* v. *Timmreck*, 441 U.S. 780, 784 (1979). *Amici* States believe that Michigan properly exercised its discretion to abolish the right to mandatory appeals from plea-based convictions and to limit the expenditure of public funds to finance applications for leave to appeal, and that the Michigan courts properly upheld Michigan's exercise of that discretion.

A reversal on the broad grounds urged by petitioner would adversely impact the interests of all the States. It would create new constitutional restrictions on the States' discretion to decide whether to appoint counsel for indigents in discretionary appeals. It would erode the settled principle that a criminal defendant can waive constitutional rights so long as he does so with "eyes open." *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 279 (1942). And it would no doubt significantly increase the number of applications for leave to appeal filed by indigents and, therefore, impose additional financial burdens on Michigan and other States.

Ironically, moreover, these financial burdens would give the States a strong incentive to eliminate *any* discretionary access to appellate courts by those entering guilty pleas – an option that is clearly authorized under this Court's decision in *McKane* v. *Durston*, 153 U.S. 684, 687 (1894). Thus, indigent criminal defendants across the Nation would likely fare worse, not better, if petitioner's arguments were adopted by this Court.

SUMMARY OF ARGUMENT

At the heart of this case is the States' "'wide discretion' to select appropriate solutions" to the difficulties they encounter in the administration of their criminal justice systems. *Murray* v. *Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring) (citation omitted). Here, Michigan has exercised its discretion to afford each defendant an absolute right to appeal from a conviction after trial. Mich. Const. of 1963, art. I, § 20. Since, 1994, however, when Michigan voters amended the Michigan Constitution to provide that all appeals from plea-based felony convictions "shall be by leave of court," *id.*, any defendant who pleads guilty (or *nolo contendere*) to a felony in a Michigan court waives the right to an appeal on the merits, although the defendant may apply for a discretionary appeal. Accordingly, *all* defendants who

choose to plead guilty under Michigan law assume the risk that their convictions and sentences will never receive full substantive review by an appellate court.

With limited exceptions, moreover, Michigan has exercised its discretion not to appoint counsel to assist indigent defendants who seek leave to appeal from a plea-based felony conviction. Mich. Comp. Laws § 770.3a. Instead, as part of the guilty plea litany, a Michigan trial judge must inform each indigent defendant who intends to plead guilty that he or she "*waives* the right to have an attorney appointed at public expense to assist in filing an application for leave to appeal or to assist with other postconviction remedies." *Id.* § 770.3a(4) (emphasis added). The judge also must "determine whether the defendant understands the waiver." *Id.* Indigent defendants thus face a conscious choice when criminal charges are brought against them: (1) they can proceed to a trial on the merits and, if convicted, exercise a right to appeal on the merits as well as the right to state-paid counsel to assist with that appeal; or (2) they can plead guilty and avoid a trial on the condition that they waive their right to appeal and any right to state-paid counsel to assist in applying for discretionary leave to appeal.

This system does not violate the Fourteenth Amendment.

I. The States have broad discretion to fashion reasonable procedural rules governing the appointment of state-paid appellate counsel for indigents. The only decision of this Court limiting that discretion is *Douglas* v. *California*, 372 U.S. 353 (1963), which held that the Fourteenth Amendment requires the States to appoint counsel to indigents in appeals *as of right* that are decided on the merits. *Douglas* thus ensures that indigent appellants can meaningfully exercise an absolute right to an appeal when the States act in their discretion to afford such a right. In *Ross* v. *Moffit*, 417 U.S. 600 (1974), however, this Court refused to extend the holding in *Douglas* to *discretionary* appeals following an appeal as of right. Since *Ross*, this Court has confirmed "that the right to

appointed counsel extends to the first appeal as of right, *and no further*." *Pennsylvania* v. *Finley*, 481 U.S. 551, 555 (1987) (emphasis added).

As in *Ross* and *Finley*, the Court should deny this latest attempt to extend *Douglas* to a new context. First, such an extension is inconsistent with the principle that, although the Equal Protection Clause may sometimes require a state to *remove* a state-created bar or hurdle to the exercise of a right, the Fourteenth Amendment is not implicated simply because indigent citizens may be at a disadvantage compared to moneyed citizens in their ability to exercise that right to the fullest. *See, e.g.*, *Washington* v. *Davis*, 426 U.S. 229, 239-42 (1976). A disparate impact is insufficient to trigger equal protection analysis where, as here, the challenged governmental action is not a government-created hurdle but a failure to subsidize the exercise of government-created rights. *Cf., e.g.*, *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 112-13 (1996); *id.* at 129 (Kennedy, J., concurring).

Second, even if the equal protection component of the Fourteenth Amendment were implicated by such a disparate impact, it would easily pass constitutional muster. Because indigency is not a suspect class, rational-basis scrutiny applies. And the state's interest in limiting the burden imposed on taxpayers by state-paid counsel certainly provides a rational basis for limiting their availability. This is a classic issue "of legislative choice based on difficult policy considerations and the allocation of scarce legal resources." *Murray*, 492 U.S. at 13 (O'Connor, J., concurring).

Third, an extension of *Douglas* to any discretionary appeals finds no basis in the text or history of the Fourteenth Amendment. That Amendment was enacted at a time when the practice of state-paid counsel was virtually unheard-of, and was clearly not considered a natural consequence of that Amendment's adoption.

II. Even assuming, for the sake of argument, that the Fourteenth Amendment affords indigent criminal defendants a right to state-paid counsel in first-tier discretionary appeals, petitioner's challenge to the Michigan statute is foreclosed by settled waiver principles. It is well-established that constitutional rights to counsel can be waived. It is equally accepted that the States can, and frequently do, require criminal defendants to waive constitutional rights as a condition of entering a guilty plea. Such waivers further legitimate state interests in promptly imposing punishment after plea-based convictions and in conserving public resources for cases in which defendants have chosen to exercise their constitutional rights and proceed to trial.

Petitioner nevertheless postulates that indigent defendants who plead guilty under Michigan law arguably are *less likely* to obtain discretionary leave to appeal than non-indigent defendants in similar circumstances. Even if this were true, however, this Court has confirmed that "absolute equality is not required," *Douglas*, 372 U.S. at 357. Instead, the constitutional inquiry is "one of degrees." *Ross*, 417 U.S. at 612. As in *Ross*, any inequality faced by indigents who decide to plead guilty, and thus waive their right to appeal and to state-paid appellate counsel, does not reach the level of "invidious discrimination." *Douglas*, 372 U.S. at 356. Petitioner cannot meet this stringent equal protection standard because, unlike in *Douglas*, neither indigent nor non-indigent criminal defendants who plead guilty under Michigan law have any guarantee of an appeal on the merits. And again, the State has a legitimate, rational basis for limiting funding for state-paid counsel. Accordingly, petitioners' equal protection attack on the Michigan waiver requirement is implausible and should be rejected.

STATEMENT OF FACTS

Amici adopt respondent's statement of facts.

ARGUMENT

All States have a strong interest in the finality of guilty pleas and in limiting the costs imposed on taxpayers by their criminal justice systems. Acting pursuant to these important interests, Michigan properly exercised its discretion to abolish the right to mandatory appeals from plea-based convictions and to limit the expenditure of public funds to finance applications for leave to appeal. That is because, as shown below in Section I, indigent criminal defendants have no right under the Fourteenth Amendment to state-paid counsel in first-tier discretionary appeals. Moreover, as shown in Section II, even if such a right existed, the States have discretion to require a waiver of that right as a condition of a guilty plea, and Michigan properly exercised that discretion in adopting the statutory waiver scheme at issue here.

I. Indigent Criminal Defendants Have No Fourteenth Amendment Right To State-Paid Counsel In First-Tier Discretionary Appeals.

Indigent criminal defendants have no Fourteenth Amendment right to state-paid counsel to assist in filing an application for a first-tier discretionary appeal. Contrary to petitioner's arguments, the limited right to counsel that this Court recognized in *Douglas* v. *California*, 372 U.S. 353 (1963), does not extend beyond direct appeals as of right. Moreover, extending *Douglas* to this new circumstance would be both unwise and unwarranted.

A. As This Court Has Held, The Limited Right To Appellate Counsel Established In Douglas Extends Only To Direct Appeals As Of Right, And "No Further."

This Court has addressed on several occasions the question whether the Fourteenth Amendment affords a right to state-paid counsel, but the Court has never found that any such right exists in connection with discretionary appeals.[1]

1. In *Douglas*, this Court addressed a situation in which the State of California had exercised its discretion to grant criminal defendants the right to a first-tier appeal on the merits. For indigent defendants, however, appellate counsel was appointed only if the appellate court first determined that such appointment would assist the defendant or the court itself – a decision that plainly implicated the merits of the appeal. In the decision at issue there, the appellate court had denied appellate counsel to the indigent petitioners, who had been tried and convicted by a jury, after concluding that "no good whatever could be served by appointment of counsel." *Id.* at 355 (citation omitted). The petitioners argued that this criminal procedure rule unconstitutionally discriminated against them, as indigents, because California granted non-indigents an unconditional right to appeal on the merits.

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[1] Petitioner argues that a first appeal allowed only "by leave of court," Mich. Const. of 1963, art. I, § 20, is not a discretionary appeal, Pet'r Br. 26 (asserting that "Petitioner's first-tier appeal to the Michigan Court of Appeals was not 'discretionary' in any sense"). This argument has no merit. Michigan law does not regulate when leave to appeal should or must be granted and, therefore, this decision by the Michigan Court of Appeals is, by definition, "discretionary." As this Court put it in *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), "if the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience." *Id.* at 266-267

The Court in *Douglas* acknowledged the States' discretion to regulate the appointment of counsel on appeal: "[A] State can, consistently with the Fourteenth Amendment, provide for differences [as to appointment of counsel on appeal] so long as the result does not amount to a denial of due process or an 'invidious discrimination.' Absolute equality is not required; lines can be and are drawn and we often sustain them." *Id.* at 356-57 (citations omitted). The Court nonetheless found that California had gone too far. Because of the need for a preliminary examination of the merits of an indigent's appeal, the Court held that "the *type of an appeal* a person is afforded in the District Court of Appeal hinges upon whether or not he can pay for the assistance of counsel." *Id.* at 355-56 (emphasis added). According to *Douglas*, an appellate court cannot "prejudge the merits" of an indigent's appeal while, at the same time, allowing appellants who can afford their own counsel to proceed directly to an appeal on the merits. *Id.* at 356.

The limited holding in *Douglas* requires the appointment of state-paid counsel only when an indigent exercises a criminal appeal that is not only on "the merits," but also "as of right":

> [W]here the merits of the one and only appeal an indigent has *as of right* are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor . . . . There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals *as of right*, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.

Id. at 357 (emphases added). *Douglas* thus ensures that indigents and non-indigents alike have a right to counsel when – but only when – a State exercises its discretion to

guarantee an absolute right to appeal on the merits. *Id.* at 358.

2. Eleven years after *Douglas*, the Court in *Ross* v. *Moffit*, 417 U.S. 600 (1974), emphasized once again that the right created in *Douglas* was limited to appeals as of right. *Ross* held that the Fourteenth Amendment does not require the States to appoint counsel for indigent defendants in discretionary state appeals or in applications for United States Supreme Court review after an appeal of right was taken and decided on the merits. In so holding, this Court reaffirmed the "common theme" in its prior holdings "that a State is not obliged to provide any appeal at all for criminal defendants," *id.* at 606 (citing *McKane* v. *Durston*, 153 U.S. 684 (1894)), but that, when it does provide a non-discretionary right to appeal, the State "cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons," *id.* at 607 (citing *Douglas*, 372 U.S. 353). The Court also clarified that "[t]he Fourteenth Amendment 'does not require absolute equality or precisely equal advantages,' . . . nor does it require the State to 'equalize economic conditions.'" *Id.* at 611-12 (citations omitted).

Applying these standards, the Court in *Ross* held that a State does not "arbitrarily cut off appeal rights for indigents" so long as its appellate system is "free of unreasoned distinctions" that result in a "meaningful appeal" for non-indigents but merely a "meaningless ritual" for indigents. *Id.* at 612 (citation omitted). The ultimate constitutional question, therefore, "is not one of absolutes, but one of degrees." *Id.* at 612.

In refusing to extend the holding in *Douglas* to discretionary appeals, the Court in *Ross* underscored the "legislative choice" afforded to the States to determine whether or not to make counsel available to convicted defendants in such appeals. As the Court put it, "[s]ome States which might well choose to do so as a matter of legislative policy may conceivably find that other claims for

public funds within or without the criminal justice system preclude the implementation of such a policy at the present time . . . . Our reading of the Fourteenth Amendment leaves these choices to the State." *Id.* at 618-19 (emphasis added).

3. Since *Ross*, the Court has consistently refused to extend *Douglas* to other contexts. In *Pennsylvania* v. *Finley*, 481 U.S. 551 (1987), for example, the Court considered whether an indigent has a constitutional right to counsel when collaterally attacking a conviction. The Court refused to extend *Douglas* to that situation given that there is not even a "federal constitutional right to counsel when pursuing a discretionary appeal on direct review." *Id.* at 555. As the Court put it, "[o]ur cases establish that the *right to appointed counsel extends to the first appeal of right, and no further.*" *Id.* (emphasis added). And the Court went on to reason that, "since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori*, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process." *Id.* (citations omitted); *see also Coleman* v. *Thompson*, 501 U.S. 722, 755 (1991) (construing *Douglas* as "establish[ing] that an indigent ... has a right to appointed counsel in his first appeal *as of right* in state court") (emphasis added); *Evitts* v. *Lucey*, 469 U.S. 387, 394 (1985) (holding that right to counsel under *Douglas* "is limited to the first appeal as of right")[2]; *Wainwright* v. *Torna*,

[2] Petitioner implies in his brief (at p. 21) that, in *Evitts*, the Court previously determined that there is a right to counsel on first-tier discretionary appeals. In that case, however, the Court was not faced with a discretionary appeal and never directly addressed the issue. On the facts before it, the Court found that the defendant was pursuing a direct appeal of right, and thus held that he was entitled to counsel under *Douglas* and to the effective assistance of such counsel under the due process clause. *Evitts*, 469 U.S. at 397, 401-402. The Court did not modify its holdings in *Douglas* or *Ross*, but instead reaffirmed that the "right to counsel is limited to the first appeal of right." *Id.* at 394.

455 U.S. 586, 587 (1982) (construing *Ross* as holding "that a criminal defendant does not have a constitutional right to counsel to pursue discretionary state appeals or applications for review in this Court").

The Court used the same reasoning in *Murray* v. *Giarratano*, 492 U.S. 1 (1989). There, the Court held that *Finley* applies equally to death penalty postconviction proceedings and, therefore, that it is up to the States to determine whether to appoint counsel to defendants in such circumstances. *Id.* at 10-11. Justice Kennedy confirmed the underlying principles of state sovereignty in his concurrence: "The requirement of meaningful access [to courts] can be satisfied in various ways. . . . The intricacies and range of options are of sufficient complexity that state legislatures and prison administrators must be given 'wide discretion' to select appropriate solutions." *Id.* at 14 (Kennedy, J., concurring) (citation omitted). And Justice O'Connor agreed in her separate concurrence that "the matter [of providing indigents state-paid counsel in postconviction proceedings] is one of legislative choice based on difficult policy considerations and the allocation of scarce legal resources." *Id.* at 13 (O'Connor, J., concurring).

4. The Court's steadfast refusal to extend *Douglas* explains why petitioner makes no meaningful effort to address his claim in the context of pertinent due process and equal protection frameworks, as *Amici* do below. Instead, in a classic example of the "domino method" of constitutional interpretation, he attempts to force-fit his situation into the limited *Douglas* holding. *Cf. Schneckloth* v. *Bustamonte* 412 U.S. 218, 246 (1973) ("We decline to follow what one judicial scholar has termed 'the domino method of constitutional adjudication . . . wherein every explanatory statement in a previous opinion is made the basis for extension to a wholly different situation.'") (citation omitted).

But this case simply does not fit the holding in *Douglas*. First, as we have explained, this Court has repeatedly

recognized that the holding there extends only "to the first appeal *of right*, and no further." *Finley*, 481 U.S. at 555. The proceeding at issue here certainly is a "first appeal," but it plainly is not an appeal "of right" given that the Michigan appellate courts have discretion to deny the appeal for any reason, or for no reason. *See supra* note 1.

Second, this case does not even fall within *Douglas'* reasoning, much less its direct holding. As we have previously explained, *Douglas* addressed the limited situation where the "*type of an appeal*" granted to a criminal defendant "hinge[d] upon whether or not [the appellant] can pay for the assistance of counsel." *Douglas*, 372 U.S. at 355-56 (emphasis added). In *Douglas*, non-indigents were *guaranteed* a right to a full appeal on the merits, whereas indigents' appeals were prejudged in the process of determining whether to give them counsel. Here, in contrast, the "type of appeal" from plea-based convictions under Michigan law is the same regardless whether the defendant is indigent or non-indigent – *i.e.*, *no* defendant has any guarantee of an appeal from a plea-based conviction.

The principal question in this case is thus whether *Douglas* should now be *extended*, for the first time, to create a new right to state-paid counsel to assist in applying for a first-tier discretionary appeal. It is to that question that we now turn.

B. The Limited Right Under *Douglas* To State-Paid Counsel In Appeals As Of Right Should Not Be Extended To First-Tier Discretionary Appeals.

As discussed above, no criminal defendant has a due process right to an appeal. *McKane*, 153 U.S. at 687. Of course, when the State exercises its discretion to afford an "appeal as of right," such an appeal must be "adjudicated in accord with due process[.]" *Evitts* v. *Lucey*, 469 U.S. 387, 396 (1985) (citation omitted). But this doctrine obviously

does not apply where, as here, a state exercises its constitutional discretion to *deny* an "appeal as of right" to a neutrally defined class of litigants (here, criminal defendants who plead guilty). *See id.* at 396 n.7.

Accordingly, the issue presented here should be governed by *Ross*, which held that when an indigent criminal defendant claims to have a Fourteenth Amendment right to state-paid appellate counsel in a discretionary appeal, that right must be based on equal protection principles: "Unfairness results only if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty. *That question is more profitably considered under an equal protection analysis.*" *Ross*, 417 U.S. at 611 (emphasis added); *see also id.* at 609 ("'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated."); *accord Smith* v. *Robbins*, 528 U.S. 259, 293 n.1 (2000) (Souter, J., dissenting); *Lewis* v. *Casey*, 518 U.S. 343, 371-72 & n.3 (1996) (Thomas, J., concurring).

Here, extension of *Douglas* to a new type of appellate proceeding – a discretionary first-tier appeal – would be unwise and inappropriate for three distinct reasons: (1) it would be contrary to the principle that the Equal Protection Clause is not triggered merely by a failure to subsidize the exercise of a right, as opposed to the creation of a governmental hurdle; (2) it would be inconsistent with this Court's teachings that indigency is not a suspect class and, therefore, that equal-protection claims based on indigency must be reviewed under a rational-basis analysis; and (3) it would be contrary to the text and history of the Fourteenth Amendment.

1. Any Extension of *Douglas* Would Be Contrary To This Court's Clear Distinction, For Equal Protection Purposes, Between State-Created Hurdles To The Exercise Of Rights And A Mere Failure To Subsidize The Exercise Or Enjoyment Of Those Rights.

Any extension of the right to counsel recognized under *Douglas* founders on the principle, recognized in this Court's prior and subsequent decisions, that equal protection analysis is not triggered by a mere failure to subsidize the exercise or enjoyment of a right, as opposed to the erection of a state-created barrier to its exercise. The Court in *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 110 (1996), addressed this dichotomy in equal protection jurisprudence when it discussed the "'age-old problem' of '[p]roviding equal justice for poor and rich, weak and powerful alike.'" *Id.* at 110 (quoting *Griffin* v. *Illinois*, 351 U.S. 12, 16 (1956)). The Court explained that its prior holdings that the States cannot "bolt the door to equal justice," *Griffin*, 351 U.S. at 24 (Frankfurter, J., concurring), by creating financial barriers to appeal must be distinguished from the "less encompassing" holding in *Douglas*:

> *In contrast to the "flat prohibition" of "bolted doors" that the* Griffin *line of cases securely established, the right to counsel at state expense, as delineated in our decisions, is less encompassing.* A State must provide trial counsel for an indigent defendant charged with a felony [under the Sixth Amendment], but that right does not extend to nonfelony trials if no term of imprisonment is actually imposed[.] A State's obligation to provide appellate counsel to poor defendants faced with incarceration applies to appeals of right. [Citing *Douglas*.] In *Ross* v. *Moffitt*, however, we held that neither the Due Process Clause nor the Equal Protection Clause requires a State to provide counsel at state expense to an indigent prisoner pursuing a discretionary

> appeal in the state system or petitioning for review in this Court.

M.L.B., at 112-13 (emphasis added) (citations omitted).[3] In his concurrence, Justice Kennedy succinctly summarized the Court's holding as follows: "[T]he State may not erect a bar in the form of transcript and filing costs beyond this petitioner's means." *Id.* at 129 (Kennedy, J., concurring).

That distinction – between a "bar" erected by the State and a mere failure to subsidize the exercise of a right under state law – is fatal to petitioner's argument. What petitioner seeks is not the removal of a state-created "bar" – *i.e.*, a financial hurdle to accessing the legal system. Instead, petitioner seeks state-paid assistance that he thinks will enable him to pursue his legal remedies as effectively as non-indigents who can afford to hire their own counsel. Thus, the Michigan law at issue here does not run afoul of the "'flat prohibition' of 'bolted doors' that the *Griffin* line of cases securely established," *M.L.B.*, 519 U.S. at 112-13. It simply limits the subsidy that the State offers to indigent defendants who choose to plead guilty.[4] With the possible exception of *Douglas*, this Court has routinely rejected similar efforts to require state-paid subsidies that go beyond the removal of hurdles the state itself has created. The rejection of such subsidies, moreover, follows from the Court's rejection of the

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[3] In *M.L.B.*, the Court held that the States may not condition appeals from trial court decrees terminating parental rights on the affected parent's ability to pay a record preparation fee. 519 U.S. at 128. *Griffin* held that the indigent petitioner was entitled to a free trial transcript to pursue his appeal. 351 U.S. at 20. Both of those requirements were obviously state-created hurdles to the exercise of litigation rights under state law.

[4] As explained at length in respondents' brief, moreover, Michigan has done its best to make it easy for criminal defendants to proceed without counsel. They have access to easy-to-follow forms. And they get free legal help to frame appellate issues in the context of seeking reconsideration at the trial court level.

disparate-impact theory of the Equal Protection Clause. *See Washington* v. *Davis*, 426 U.S. 229, 239 (1976). It is well-established that "a law or official act does not violate the Constitution "*solely* because it has a . . . disproportionate impact." *Id.* at 239; *see also, e.g., Lewis* v. *Casey*, 518 U.S. 343, 375-78 (1996) (Thomas, J., concurring) (citing cases); *Harris* v. *McRae*, 448 U.S. 297, 323 n.26 (1980) (holding that "it is incumbent upon the [equal protection] challenger to prove that Congress selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group") (citations omitted); *Mayer* v. *Roe*, 432 U.S. 464, 470-71 (1977); *cf. M.L.B.*, 519 U.S. at 135 ("The [Equal Protection] Clause is not a panacea for perceived social or economic inequity; it seeks to 'guarante[e] equal laws, not equal results.'") (Rehnquist, C.J., dissenting) (citation omitted). Consistent with this principle, this Court should reject petitioner's arguments and hold instead that government action that may have a disparate impact on the poor does not for that reason trigger equal protection analysis unless the government has erected an affirmative "bar" or "hurdle" to the exercise of a right.[5]

[5] In his dissent in *M.L.B.*, Justice Thomas, joined by Justice Scalia, stated that he "would be inclined to vote to overrule *Griffin* and its progeny," presumably including *Douglas*, and hold that a disparate impact on the poor cannot trigger an equal-protection violation at all. *M.L.B.*, 519 U.S. at 139 (Thomas, J., dissenting). This case does not require the Court to decide that issue or to overrule either *Griffin* or *Douglas*. Instead, consistent with *Ross*, *Finley* and *Murray*, the Court should simply refuse to extend *Douglas* to this new situation.

2. Any Extension of *Douglas* Would Be Contrary To This Court's Teaching That Indigency Is Not A Suspect Class And, Therefore, That Indigency-Based Claims Are Subject To Rational Basis Review.

Even assuming, for the sake of argument, that this case triggers an equal protection analysis, petitioner's arguments do not satisfy the pertinent equal protection standards. To prevail on such a claim, petitioner must show that the Michigan statute "operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict scrutiny." *San Antonio Indep. School Dist.* v. *Rodriguez*, 411 U.S. 1, 17 (1973). Yet this Court has repeatedly held that "wealth discrimination alone" does not provide "an adequate basis for invoking strict scrutiny[.]" *Id.* at 29; *Harris*, 448 U.S. at 323 ("this Court has held repeatedly that poverty, standing alone is not a suspect classification" for equal protection purposes). Consequently, Michigan's statute passes equal protection muster as long as "it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination." *Rodriguez*, 411 U.S. at 17.

1. Petitioner faces a heavy burden of proving an equal protection violation under this standard because "every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system. . . . '[T]he maintenance of the principles of federalism is the foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action.'" *Id.* at 44 (citations omitted). The Michigan statute is thus entitled to a "presumption of validity[.]" *Id.* at 55.

Under these settled standards, indigent defendants have no equal protection right to state-paid counsel in first-tier

discretionary appeals when state criminal procedure statutes, like the one at issue here, do not arbitrarily "single[] out" indigents by unfairly denying them a right to an appeal on the merits. *Id.* at 611. Even the Court in *Douglas* emphasized that the States may "provide for differences" in the circumstances under which appellate counsel will be appointed as long as the adopted procedures do not amount to "an 'invidious discrimination.'" 372 U.S. at 356 (citations omitted).

Here, Michigan has properly exercised its discretion to "provide for [such] differences." *Id.* In particular, Michigan appoints counsel for indigent criminal defendants who have an unqualified right to appeal, but it declines to appoint counsel to criminal defendants who have only a limited right to apply for first-tier discretionary appellate review. The pertinent constitutional question, therefore, is whether this "difference[]" in treatment results in "invidious discrimination" against indigents. *Id.* It does not.

There can be no "invidious discrimination" where, as here, a State exercises its discretion to impose on *all* criminal defendants who plead guilty – indigents as well as non-indigents – the initial hurdle of applying for discretionary leave of the appellate court to review the case on the merits. Unlike in *Douglas*, indigents and non-indigents who plead guilty in Michigan have no right to an appeal on the merits regardless of whether they are represented by counsel. Affluent defendants who plead guilty in Michigan may not receive leave to appeal despite the best efforts of their counsel. And the appointment of counsel to indigents in petitioner's situation certainly would not guarantee any appeal on the merits.

Michigan law thus does not "single[] out" indigent criminal defendants or otherwise deny them "meaningful access to the appellate system" – *i.e.*, an absolute *right* to an appeal on the merits – "because of their poverty." *Ross*, 417 U.S. at 611. Under these circumstances, any purported equal protection

concern is purely speculative and, therefore, must give way to "legislative choice" so long as that "choice" has a rational basis. *Ross*, 417 U.S. at 618; *see also Rodriguez*, 411 U.S. at 17.

2. The Michigan statute has a clear, rational basis and, therefore, is not invidiously discriminatory. *Rodriguez*, 411 U.S. at 17. It is undisputed that Michigan validly requires each defendant who pleads guilty to waive his or her right to appeal. *See, e.g.*, *McKane* v. *Durston*, 153 U.S. 684, 687 (1894). As the Michigan Supreme Court has said, this decision was deemed necessary to "reduce a crushing burden on [Michigan's] appellate courts":

> Before the ratification of Proposal B [the provision at issue] in 1994, Michigan was one of only a handful of states that provided an unconditional right of appeal for those who pleaded guilty. In 1994, the Legislature submitted Proposal B to the electorate to decide whether to make appeals from plea-based convictions discretionary. . . . By 1992, the Court of Appeals had a backlog of more than 4,000 cases awaiting decision, and "[p]lea-based appeals constitute[d] approximately thirty percent of all appeals facing the Michigan Court of Appeals." *Eliminating appeals of right from plea-based convictions was one method proposed to reduce a crushing burden on our appellate courts.*

People v. *Bulger*, 614 N.W.2d 103, 106-07 (Mich. 2000) (emphasis added) (citations and footnote omitted).

Michigan similarly acted with a rational basis – not "arbitrarily" in violation of the Fourteenth Amendment, *Ross*, 417 U.S. at 607 – when it limited the right to state-paid counsel in connection with applications for leave to appeal from plea-based convictions. Such legislation is consistent with a state's laudable goals: (1) to "more promptly impose[] punishment after an admission of guilty"; (2) to "more effectively attain the objectives of punishment"; and (3) to

conserve "scarce judicial and prosecutorial resources . . . for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof." *Brady* v. *United States*, 397 U.S. 742, 752 (1970). As the Court noted in *United States* v. *Timmreck*, 441 U.S. 780 (1979):

> Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas.

Id. at 784 (citation omitted).

Absent the limitations on state-paid counsel, indigents would have every incentive to apply for leave to appeal, regardless of whether the application had merit, because Michigan taxpayers would be footing the bill. Michigan – which, again, has no constitutional obligation to allow even a discretionary appeal from any conviction – thus acted rationally and in furtherance of a legitimate purpose when it passed a law providing appointed appellate counsel to indigents only in limited circumstances once they admit their crime by pleading guilty and waive their right to an appeal. *See Rodriguez*, 411 U.S. at 54-55 ("The constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest.").

3. Petitioner's equal protection claim is based solely on conjecture that indigent defendants who have no right to appeal but who may apply for a discretionary appeal are *less likely* to obtain leave to appeal than non-indigent defendants in similar circumstances. This may be true, but it does not establish an equal protection violation as long as indigents and non-indigents alike are denied an absolute right to appeal.

As the Court put it in *Ross*, "[t]he duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process." *Ross*, 417 U.S. at 616 (emphasis added); *accord Smith* v. *Robbins*, 528 U.S. 259, 277 n.9 (2000).[6]

That is what Michigan has done. Indeed, its statute is fully consistent with the holdings in *Ross* and other cases discussed above in which the Court found that disparate impact based on wealth was not "so irrational as to be invidiously discriminatory." *See, e.g., Rodriguez*, 411 U.S. at 54-55 (finding that reliance by Texas school-financing system on local property taxation did not violate Equal Protection Clause). Michigan acted with a rational basis and thus properly exercised its "legislative choice," *Ross*, 417 U.S. at 618, to require defendants who plead guilty to waive any right to state-paid counsel in connection with a first-tier discretionary appeal.

3. Any Further Extension of *Douglas* Would Be Contrary To The Language And History Of The Fourteenth Amendment.

Finally, neither the text nor the history of the Fourteenth Amendment supports any extension of *Douglas* to first-tier discretionary appeals.

As the Court is well aware, the only provision of the United States Constitution that expressly addresses a right to counsel

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[6] Any "access-to-appeal blockages" here are caused by an indigent's inability to afford competent counsel, not by a barrier created by the State. *Kowalski* v. *Tesmer*, 125 S. Ct. 564, 576 (2004) (Ginsburg, J., dissenting). There is thus no barrier to remove under the Equal Protection Clause. Again, that Clause does not require "the State to 'equalize economic conditions.'" *Ross*, 417 U.S. at 612 (citing *Griffin*, 351 U.S. at 23).

is the Sixth Amendment. U.S. Const. amend. VI; *Gideon* v. *Wainwright*, 372 U.S. 335, 343-345 (1963). That Amendment, however, does not apply to appellate proceedings at all. *Martinez* v. *Court of Appeals*, 528 U.S. 152, 160-161 (2000). And that, of course, is why petitioner does not assert that he has any right to state-paid appellate counsel under the Sixth Amendment.

Nor has petitioner has cited anything in the history or structure of the Fourteenth Amendment to suggest that the framers and ratifiers of that amendment could have contemplated that it would be used to create a due process or equal protection right to state-paid appellate counsel – particularly where the asserted basis for the right is indigency rather than race. *Cf. City of Boerne* v. *Flores*, 521 U.S. 507, 520-24 (1997) (discussing how Fourteenth Amendment focused on race discrimination); *Washington* v. *Davis*, 426 U.S. 229, 239 (1976). The absence of such history is hardly surprising because the framers and ratifiers of the Sixth Amendment – which, unlike the Fourteenth Amendment, specifically references a right to counsel – did not contemplate a right to any state-paid counsel, either. As this Court stated in *Scott* v. *Illinois*, 440 U.S. 367 (1979), "[t]here is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense." *Id.* at 370. There appears to be no serious dispute among legal scholars and historians that the Sixth Amendment, as enacted, provided nothing more than a right of an accused to the assistance of his or her own personally funded counsel and in no way mandated that counsel be provided by the government, be it federal or state.[7]

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[7] *See, e.g.*, Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 114 (1998) ("[T]he Sixth Amendment gave the accused some freedom, some autonomy, in controlling the shape of 'his defence' [including] . . . whom (if anyone) to hire as a lawyer."); Anthony Lewis, *Gideon's Trumpet* 110 (Vintage Books 1989) (1964) ("Historically speaking, the amendment was almost certainly not envisaged by its framers as reaching the problem of the man too poor to hire a lawyer for his defense.").

It was not until the 1932 decision in *Powell* v. *Alabama*, 287 U.S. 45 (1932) – decided 64 years after the Fourteenth Amendment was ratified in 1868 – that this Court first held that "the right to have counsel appointed [under the Sixth Amendment], when necessary, is a logical corollary from the constitutional right to be heard by counsel." *Id.* at 72. And it was not until the 1963 decision in *Gideon* – almost 100 years after the Fourteenth Amendment was ratified – that the Sixth and Fourteenth Amendments were deemed to provide indigent defendants a right to state-provided counsel in felony proceedings. 372 U.S. 335, 344-45 (1963).

Given this slow evolution of the Court's right-to-counsel jurisprudence, the framers and ratifiers of the Fourteenth Amendment could not have contemplated that it would be construed as creating a constitutional right to state-paid appellate counsel when the Amendment became effective in the mid-1800s.

This Court's early precedent holding that the States have broad discretion to deny criminal defendants the right to *any* appeal on the merits strongly supports this conclusion. In 1894, the Court held:

> An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. *A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law.* It is wholly within the discretion of the state to allow or not to allow such a review.

McKane, at 687 (emphasis added). Such discretion is elementary to basic principles of state sovereignty – so much so that "[a] citation of authorities upon the point is unnecessary." *Id.* Petitioner's argument for a new, judicially-established Fourteenth Amendment right to state-paid counsel in connection with first-tier discretionary appeals cannot be squared with this history, and is certainly not compelled by the language or history of the Fourteenth Amendment.

II. Even If Indigent Defendants Have A Fourteenth Amendment Right To State-Paid Counsel In First-Tier Discretionary Appeals, The States Have The Discretion To Require Waiver Of That Right As A Condition Of A Guilty Plea.

Even if the Court decided to extend *Douglas* and hold that indigent criminal defendants have a Fourteenth Amendment right to state-paid counsel in first-tier discretionary appeals, petitioner still must establish that he did not waive this right when he opted to enter a guilty plea to avoid trial. As we show below, it is well-established that defendants can voluntarily waive their constitutional rights to counsel, and that the States may require defendants to waive constitutional rights as a condition of accepting a guilty plea. It logically follows that the States have the discretion to condition plea-based convictions on a waiver by the defendant of any Fourteenth Amendment right to state-paid counsel. Michigan properly exercised that discretion here.

A. The States Can Validly Require Waiver Of Constitutional Rights As A Condition Of A Guilty Plea.

1. There can be no serious doubt that constitutional rights can be waived by criminal defendants. For example, in *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), this Court noted that a criminal defendant was free to waive his right to counsel so

long as he did so knowingly and intelligently so that it was "an intentional relinquishment or abandonment of a known right or privilege." *Id.* at 464; *see also Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 279 (1942) (defendant can waive his right to counsel so long as he does so "with eyes open").

Moreover, this Court has held that a criminal defendant may waive his right to counsel knowingly and intelligently even without complete knowledge of the potential consequences. In *United States* v. *Ruiz*, 536 U.S. 622 (2002), for example, this Court held that a prosecutor need not provide all potential impeachment information to a criminal defendant before he enters a guilty plea. *Id.* at 625. Although the prosecutor would have been forced to disclose this information had the case gone to trial, the failure to disclose it did not render the defendant's guilty plea unknowing. As the Court put it:

> [T]he law ordinarily considers a waiver knowing, intelligent and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances – even though the defendant may not know the *specific detailed* consequences of invoking it.

Id. at 629.

Similarly, in *Iowa* v. *Tovar*, 124 S. Ct. 1379 (2004), the Court faced the question of what warnings were required to make a waiver of counsel at the guilty plea stage knowing and intelligent. The Court rejected the notion, adopted by the court below, that the trial judge was required to warn defendants of the specific uses that an attorney could serve. *Id.* at 1389. The Court concluded instead that, on the facts of that case, the warnings given to the criminal defendant, including the trial court's provision of the ordinary guilty plea litany, were sufficient to inform the defendant of his right to counsel and provide him with sufficient information to

knowingly and intelligently waive his right to counsel. *Id.* at 1389-90.

2. This Court's decisions also establish that a government can require criminal defendants to waive their constitutional rights as a condition of pleading guilty. All criminal defendants have constitutional guarantees to trial by jury, against self-incrimination and to confront accusers. U.S. Const. amends. V, VI. Nevertheless, the States can, and frequently do, require defendants to waive these constitutional protections as a condition of accepting a guilty plea: "When a defendant pleads guilty he or she, of course, forgoes not only a fair trial, but also other accompanying constitutional guarantees." *Ruiz*, 536 U.S. at 628-29. Indeed, the vast majority of criminal defendants voluntarily choose to waive their constitutional rights in return for the "likelihood of securing leniency should a guilty plea be offered and accepted." *Brady*, 397 U.S. at 748-56 (recognizing that "well over three-fourths of the criminal convictions in this country rest on pleas of guilty") (citations omitted); *see also Timmreck*, 441 U.S. at 784 ("[T]he vast majority of criminal convictions result from [guilty] pleas").

Such waivers, moreover, are generally both knowing and intelligent, thus raising no constitutional concerns. *Brady*, 397 U.S. at 753 (Court could not find that a system in which the government offers the defendant an incentive to plead guilty somehow renders the waiver of the right to trial involuntary.). As this Court put it in *Tollett* v. *Henderson*, 411 U.S. 258 (1973), "a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Id.* at 267.

Petitioner cites no decisions of this Court, and we are aware of none, limiting the States' discretion to condition guilty pleas on a waiver of constitutional rights, so long as the waiver is knowing and intelligent. Neither *Douglas* nor *Ross* sheds any light on this issue given that the defendants in these cases opted to exercise their constitutional rights and proceed to trial. Other holdings by this Court, however, clearly establish that "[t]he most basic rights of criminal defendants are . . . subject to waiver." *Peretz* v. *United States*, 501 US 923, 936 (1991); *see also United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995).

B. The Michigan Statute Validly Requires Waiver Of The Right To Counsel As A Condition Of A Guilty Plea.

While acknowledging that the Michigan statute requires a waiver of any right to counsel as a condition of a plea, petitioner nevertheless argues that this waiver requirement "itself violates the Fourteenth Amendment." Pet'r Br. 44. But petitioner is wrong.

1. Prior to petitioner's plea, Michigan provided him, along with all other criminal defendants, an *absolute* guarantee to an appeal on the merits and thus "an adequate [and absolute] opportunity to present his claims fairly in the context of the State's appellate process." *Ross*, 417 U.S. at 616. This guarantee included the right to appointed appellate counsel under *Douglas*.

Michigan merely required petitioner to waive this absolute right to appeal and the attendant right to appointed appellate counsel if he decided to plead guilty. *See* MCL 770.3a (requiring judge to "advise the defendant that, if a plea is accepted by the court, the defendant waives the right to have an attorney appointed at public expense to assist in filing an application for leave to appeal"). Petitioner, of course, was free to decline this opportunity.

2. According to petitioner, however, the Michigan statute, MCL 770.3a, runs afoul of *Douglas* because it requires indigents who opt to plead guilty to give up the assistance of state-paid counsel in connection with an application for leave to appeal, "while a moneyed defendant would not be required to give up *meaningful appellate review* of such sentencing errors." Pet'r Br. 44 (emphasis added). This argument distorts Michigan law, which provides no right to "meaningful appellate review of . . . sentencing errors" to *any* defendant who pleads guilty. Again, unlike in *Douglas*, no criminal defendant – regardless of financial status – has a right to appeal from a plea-based conviction. *See* Mich. Const. of 1963, art. I, § 20. As demonstrated above, this fact alone distinguishes *Douglas*.

Petitioner simply overlooks the fact that Michigan afforded him the constitutional right to appointed appellate counsel established under *Douglas*. To the extent petitioner was concerned about his right to an appeal on the merits and the assistance of counsel in that appeal, he had every opportunity to proceed to trial and preserve those rights. Criminal defendants like petitioner who opt to plead guilty cannot complain about the loss of constitutional rights that were surrendered voluntarily.[8]

The voluntary nature of petitioner's waiver, and the fact that affluent defendants have no more right to appeal than indigent defendants, forecloses his equal protection challenge to Michigan's waiver requirement. This Court confirmed in *Douglas* that "absolute equality is not required" in connection

[8] *Amici* take no position on whether, in this case, the actual circumstances of petitioner's plea conform to the requirements of the statute and therefore constitute a constitutionally valid waiver by the defendant. We defer to respondent's treatment of this issue. We note, however, that if the Court were to conclude that the waiver in this case was invalid, the proper remedy would be to vacate the decision below and allow the courts below an opportunity to determine in the first instance how best to respond to that invalidity.

with the States' discretion to appoint appellate counsel to indigents, 372 U.S. at 356-57, and that the key constitutional inquiry "is not one of absolutes, but one of degrees," *Ross*, 417 U.S. at 612.

Here, *all* criminal defendants (indigents and non-indigents alike) who decide to plead guilty under Michigan law make that decision with full disclosure and an understanding that their right to absolute appeal will be waived and, therefore, that their ability to succeed on appeal may be severely curtailed. Even assuming that the likelihood of success under these circumstances will be smaller for indigents than non-indigents, that purported inequality simply does not rise to a degree of "invidious discrimination," *Douglas*, 372 U.S. at 356, and thus does not create an equal protection violation.

Indeed, as discussed earlier (*supra* pp. 17-20), to sustain the waiver requirement against an equal protection challenge based on that requirement's alleged disparate impact on the indigent, all that Michigan must do is to establish that the requirement has a rational basis. As the Michigan Supreme Court held in *Bulger*, the waiver requirement (1) promotes finality in criminal judgments, and (2) conserves judicial and financial resources for other priorities. 614 N.W.2d at 106-07. Petitioner cannot meet his burden of establishing that the waiver requirement is not rationally related to these legitimate – indeed significant – governmental interests.

* * * * *

While some States may legitimately choose to provide state-paid counsel to indigents who pursue discretionary appeals, the States must be allowed to retain discretion under the Fourteenth Amendment to "find that other claims for public funds within or without the criminal justice system preclude the implementation of such a policy[.]" *Ross*, 417 U.S. at 618. Accordingly, this Court should adhere to its ruling in *Ross* that, absent a direct violation of *Douglas*, this is a "legislative choice" that is left to the States. Petitioner's

argument that the issue should be decided as a matter of federal constitutional law reflects a "'mother knows best' approach" that "should play no part in traditional constitutional adjudication." *Murray*, 492 U.S. at 11.

CONCLUSION

The judgment of the Michigan Court of Appeals denying petitioner's application for leave to appeal should be affirmed.

Respectfully submitted,

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ANTONIO DWAYNE HALBERT,

Petitioner,

v.

MICHIGAN,

Respondent.

ON WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation and the only national bar association working in the interest of public and private criminal defense attorneys and their clients. Founded in 1958, NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL has more than 12,000 members nationwide—joined by 90 state, local, and international affiliate organizations with another 35,000 members—including private criminal defense lawyers, public defenders, and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

The National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. NAFD is a nationwide, non-profit, volunteer organization whose membership includes attorneys and support staff of Federal Defender offices. One of the guiding principles of NAFD is to promote the fair administration of justice by appearing as *amicus curiae* in litigation relating to criminal law issues, particularly issues affecting indigent defendants.

In this case, NACDL and NAFD are concerned that Michigan is denying appellate counsel to indigent defendants who plead guilty or nolo contendere, requiring these defendants—most of whom are functionally illiterate—to identify and brief complicated sentencing and other errors in their first and only appeal on the merits.

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1. No counsel for a party authored this brief in whole or in part. No person or entity other than NACDL, NAFD, and their counsel made a monetary contribution to the preparation or submission of this brief. Both Petitioner and Respondent have consented to the filing of this brief, and pursuant to Rule 37.3(a), NACDL and NAFD have filed the letters of consent with the Clerk of the Court.

SUMMARY OF ARGUMENT

I. It is remarkable that over forty years after this Court's landmark decisions in *Gideon v. Wainwright* and *Douglas v. California*, a State would seek to deprive counsel to the poor at a critical stage in the criminal justice process. As Petitioner aptly has demonstrated, Michigan's system falls squarely under *Douglas*, and the deprivation of counsel to indigent defendants under Michigan Compiled Laws (MCL) § 770.3a violates both due process and equal protection. But this case transcends the constitutional principles underlying *Douglas*.

Michigan's appellate "Application" process for indigents who plead guilty constitutes a "critical stage" of criminal proceedings covered by the Sixth Amendment's right to counsel under *Gideon*. Because of uniform adherence to *Douglas*, this Court never has needed to address whether a State's post-conviction proceedings for reviewing errors, like Michigan's, constitute a "critical stage." But the Michigan Application for leave to appeal process is every bit as critical as other stages. As Petitioner's case illustrates, the Application is the first and only stage to raise and preserve errors concerning the effectiveness of trial counsel, the government's conduct during the plea process, and the propriety of the sentence, serving as a needed check to ensure pre- and post-conviction constitutional rights are fulfilled. Issues not raised in the Application are waived. Mich. Ct. R. (MCR) 7.205(D)(4). In other post-conviction proceedings where similar interests are at stake, such as sentencing, this Court has held that counsel is required under the Sixth Amendment. *Mempa v. Rhay*, 389 U.S. 128, 134-37 (1967); *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion). This Court has noted that *Gideon*'s right to counsel in critical stages should apply "when new contexts appear presenting the same dangers that gave birth initially to the right [to counsel] itself." *United States v. Ash*, 413 U.S. 300, 311 (1973). Michigan's system is exactly that. Accordingly, even if Michigan was correct that its unprecedented new system for

indigents who plead guilty evades the dictates of *Douglas* (which it does not), the Michigan system runs afoul of the Sixth Amendment.

Beyond the Sixth Amendment, Michigan's scheme departs from the traditional practice in all states of providing counsel to indigent defendants on their first, and only, opportunity to have a lawyer cull the record, analyze the law, and identify potential errors in the defendants' convictions and sentences. The abrogation of that practice itself constitutes an independent violation of due process. *See Cooper v. Oklahoma*, 517 U.S. 348, 362 (1996). Since this Court's March 18, 1963 watershed decisions in *Gideon* and *Douglas*, no jurisdiction other than Michigan—not one—has denied an indigent defendant the assistance of counsel in an initial error-correcting appeal, regardless of whether the first appeal was by leave or as of right. MCL § 770.3a thus offends "a principle of justice that is deeply 'rooted in the traditions and conscience of our people,'" and correspondingly violates due process. *Id.* (quotation source omitted).

II. Michigan defends MCL § 770.3a on the ground that indigent defendants can adequately protect their own rights on first appeal because the State provides them transcripts and a "nontechnical and easily understood" form Application to appeal. *See* Opp. Cert. 20. That position ignores both the abilities of indigent appellants and the real world complexity of guilty plea appeals.

Indigent defendants who plead guilty are the poorest, least educated, least literate members of our society. National literacy studies show that these defendants, most of whom are incarcerated, lack the skills necessary to write a note disputing an improper charge on a credit card bill, much less meet the substantive and procedural requirements of perfecting and litigating an appeal. Moreover, while involving fewer issues than appeals after trial, appeals following guilty pleas are equally complex. Guilty plea appeals typically involve errors under the notoriously difficult Michigan Sentencing Guidelines and are

subject to unforgiving procedural requirements under the Michigan Court Rules.

Reflecting the complexity of the issues—and contrary to the myth that most appeals following guilty pleas are frivolous—the success rate of these appeals is relatively high. Indeed, an examination of a typical indigent appeal in Michigan confirms, "[t]o prosecute the appeal, a criminal appellant must face an adversary proceeding that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding." *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). No matter how many "user-friendly" forms Michigan creates or how many unskilled jailhouse lawyers help indigent defendants like Petitioner stumble along, there is no substitute for the guiding hand of counsel.

In short, Michigan's system under MCL § 770.3a is so fundamentally flawed—so contrary to the principles underlying the right to counsel—that unconstitutionality permeates the entire scheme.

ARGUMENT

I. Michigan's Deprivation of Counsel to Indigent Appellants Violates Constitutional Principles Independent from Those Underlying *Douglas*

As Petitioner has demonstrated, Michigan's deprivation of appellate counsel under MCL § 770.3a violates both due process and equal protection under the Fourteenth Amendment. *Douglas v. California*, 372 U.S. 353 (1963); *accord Evitts v. Lucey*, 469 U.S. 387 (1985); *Ross v. Moffitt*, 417 U.S. 600 (1974). Appeals following guilty pleas[2] in Michigan are not truly "discretionary," and the Constitution would mandate the appointment of counsel even if they were. The Court need go no further than *Douglas* and its progeny to strike down the Michigan system as

2. MCL § 770.3a applies to defendants who plead guilty, guilty but mentally ill, or nolo contendere. *Id.* § 770.3a(1). For convenience, this brief will refer only to "guilty pleas," though our discussion will apply to all three types of convictions covered by the statute.

unconstitutional. But putting *Douglas* aside, Michigan's scheme independently violates the Constitution.

A. Michigan's Appellate "Application" Process Is a "Critical Stage" Requiring Counsel Under *Gideon*

On March 18, 1963, this Court issued both *Gideon* and *Douglas*. *Gideon*, of course, held that the right to counsel under the Sixth Amendment is "so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment." *Gideon*, 372 U.S. at 340 (quotation omitted). For its part, *Douglas*—relying not on the Sixth Amendment, but on due process and equal protection grounds—held that an indigent defendant must be provided counsel for a first appeal as of right. *Douglas*, 372 U.S. at 357-58.

In the four decades since, this Court further defined the parameters of *Gideon* and *Douglas*. Expanding on *Gideon*, this Court deemed the Sixth Amendment's right to counsel so fundamental that it applies not only at trial, but to "all 'critical stages' of the criminal process." *Iowa v. Tovar*, 124 S. Ct. 1379, 1387 (2004). Critical stages include "every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." *Mempa v. Rhay*, 389 U.S. 128, 134 (1967); *accord Bell v. Cone*, 535 U.S. 685, 695-96 (2002) (critical stage "denote[s] a step of a criminal proceeding, such as arraignment, that held significant consequences for the accused."). They are those stages involving "trial-like confrontations," such as where a defendant would need assistance to confront either his adversary or a State's intricate procedural system. *See United States v. Ash*, 413 U.S. 300, 312 (1973). Accordingly, this Court has extended the right to counsel to steps in the criminal process that occur before and after trial and conviction, including sentencing. *See Hamilton v. Alabama*, 368 U.S. 52, 53-54 (1961) (arraignment is a critical stage); *United States v. Wade*, 388 U.S. 218, 236-37 (1967) (post-indictment line-up is a critical stage); *Mempa*, 389 U.S. at 137 (sentencing is a critical stage); *Gardner*

v. Florida, 430 U.S. 349, 358 (1977) (sentencing is a critical stage) (plurality opinion).

Until now, every jurisdiction in the United States has required the appointment of counsel on first appeal under *Douglas*. Thus, this Court never has needed to address whether a post-sentencing proceeding like Michigan's appellate "Application"[3] process for plea-based convictions is a "critical stage" covered by *Gideon*. Michigan's system, however, easily meets the requirements of a critical stage.

First, Michigan's Application process for those who plead guilty is a step "where substantial rights of a criminal accused may be affected." *Mempa*, 389 U.S. at 134. Unlike truly "discretionary" second-tier appeals or collateral proceedings,[4] Michigan's appellate Application process is the first and only procedure aimed at correcting error. It provides a vital check on the government's conduct during pleas and presents one of the few opportunities to prevent other constitutional violations that typically are identified and raised only post-conviction, such as errors in sentencing.

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3. Michigan has fractured guilty-plea appeals into two steps, the first being an Application for leave to appeal, *see* MCR 7.205(B), and if that is granted, the second being an appeal. MCR 7.205(D)(3).

4. As this Court distinguished in *Ross*:

> We are fortified in this conclusion by our understanding of the function served by discretionary review in the North Carolina Supreme Court. The critical issue in that court, as we perceive it, is not whether there has been "a correct adjudication of guilt" in every individual case, but rather whether "the subject matter of the appeal has significant public interest". . . . The Supreme Court may deny certiorari even though it believes that the decision of the Court of Appeals was incorrect.

417 U.S. at 615 (citations omitted); *accord Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993) ("When the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. . . .").

Further, the risk of waiving the right to challenge these violations alone renders Michigan's procedure a critical stage. In *Mempa*, for instance, the Court deemed sentencing a critical stage because the absence of counsel could result in the waiver of appellate rights. *See id.* at 135 ("Even more important in a case such as this is the fact that certain legal rights may be lost if not exercised at this stage."); *see also Hamilton*, 368 U.S. at 54-55 (arraignment is critical stage because rights may be waived without counsel). In Michigan, the indigent defendant's failure to raise an error in his *pro se* Application constitutes waiver, even if the error involves the deprivation of constitutional rights. Indeed, such risks already have come to fruition under Michigan's system. In *People v. Plaza*, 617 N.W.2d 687 (Mich. 2000), the Michigan Supreme Court summarily denied review of a case involving the State's purported failure to provide an indigent defendant a transcript to assist his *pro se* appeal. In her concurrence, Justice Corrigan based the denial on the ground that the issue had been waived because the indigent defendant failed to raise the error in his *pro se* Application. *Id.* at 687 (Corrigan, J., concurring). In her dissent, however, Justice Kelly cogently recognized that the case illustrated a fundamental flaw in Michigan's system:

> The concurrence points out that defendant failed to raise the issue in his application to the Court of Appeals. Defendant, untrained in law, may have been unaware of the consequences of failing to raise it. If so, this case illustrates why indigent defendants need the assistance of appointed appellate counsel, even when they have pleaded guilty. There is a distinct possibility that defendant was wrongly sentenced in this case. He is being denied a reasonable hearing because, lacking legal counsel, he did not follow the procedural requirements of appellate review.

Id. at 688 (Kelly, J., dissenting). As *Plaza* demonstrates, Michigan's process presents the very real risk that substantial

constitutional rights—many of which could not have been protected by trial counsel—can be lost in the *pro se* Application process.

Second, Michigan's process is a "critical stage" because it requires a defendant to confront a State's intricate procedural system. *See Ash*, 413 U.S. at 311-12. Michigan's procedures for guilty plea appeals are no less formidable than the procedures for appeals following trial. As discussed in detail below, an appeal following a guilty plea in Michigan follows the customary process for any appeal. To seek leave to appeal, the indigent must timely invoke the appellate process; follow other procedural requirements to perfect the appeal; read, understand, and analyze the record; identify legal issues cognizable on appeal; locate, read, and understand case decisions, statutes, rules, and other authorities; and support contentions with legal authorities and specific references to the record. Just because the appeal follows a guilty plea, "[t]he need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to the appellate stage. Both stages ... require careful advocacy to ensure that rights are not forgone and that substantial legal and factual arguments are not inadvertently passed over." *Penson v. Ohio*, 488 U.S. 75, 85 (1988).

To be sure, this Court has not yet recognized a constitutional right to appeal. And in other contexts, the Court has stated that the right to counsel on appeal is generally covered by the Fourteenth, as opposed to the Sixth, Amendment. *See Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 160 (2000). As a threshold matter, however, under the critical stage analysis, the right to counsel applies based upon the significance of the proceeding, not whether the accused has a right to the proceeding in the first instance.

So, for example, an accused has a right to counsel at a preliminary hearing, even if he has no right to a preliminary hearing;[5] during a lineup, even if he has no right to appear in a lineup;[6] during a guilty or no contest plea proceeding, even if he has no right to plead guilty or no contest.[7]

As for the constitutional underpinnings of the doctrine, because of uniform adherence to *Douglas* in every state, this Court never has needed to directly apply the "critical stage" analysis where appellate rights are involved. Where the *Gideon* and *Douglas* lines of cases have intersected, however, this Court has recognized that the Sixth Amendment is implicated post-conviction. Specifically, in *Evitts v. Lucey*, this Court determined that the right to effective assistance of counsel under the Sixth Amendment—traditionally applied only to "critical stages"—applies to a defendant's first appeal of right. 469 U.S. at 396. Later in *Penson v. Ohio*, this Court applied the critical stage "presumption of prejudice" standard for ineffective assistance of counsel to defendants denied counsel on a first appeal:

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5. *Coleman v. Alabama*, 399 U.S. 1, 8-9 (1970).

6. *See Wade*, 388 U.S. at 237-38 (1967) ("[T]here can be little doubt that for Wade the postindictment lineup was a critical stage of the prosecution at which he was as much entitled to such aid (of counsel) as at the trial itself.") (internal quotation marks and alterations omitted); *United States v. Poe*, 462 F.2d 195, 198 (5th Cir. 1972) ("There is no right to a lineup.").

7. *Iowa*, 124 S. Ct. at 1383 ("The entry of a guilty plea, whether to a misdemeanor or a felony charge, ranks as a 'critical stage' at which the right to counsel adheres.") (citations omitted); *Santobello v. New York*, 404 U.S. 257, 262 (1971) ("A court may reject a plea in exercise of sound judicial discretion.").

> [T]he presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. . . . Because the fundamental importance of the assistance of counsel does not cease as the prosecutorial process moves from the trial to the appellate stage, the presumption of prejudice must extend as well to the denial of counsel on appeal.

488 U.S. at 88 (citations omitted); *see also Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000) ("The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage. The same is true on appeal.") (citations omitted); *cf. Arsenault v. Massachusetts*, 393 U.S. 5, 6 (1968) (per curiam) ("The right to counsel at the trial, on appeal, and at the other 'critical' stages of the criminal proceedings have all been made retroactive, since the 'denial of the right must almost invariably deny a fair trial.'") (citations omitted).

Regardless, nothing prevents the application of *Gideon* and the Sixth Amendment here. This Court repeatedly has recognized that the "critical stage" doctrine warrants application "when new contexts appear presenting the same dangers that gave birth to the right [to counsel] itself." *Ash*, 413 U.S. at 311; *see also Wade*, 388 U.S. at 224-26. Michigan's system of denying appointment of counsel in the first and only proceeding aimed at correcting errors is one of those new contexts. Thus, even if Michigan's unprecedented denial of appellate counsel for indigent defendants who plead guilty can be said to evade the dictates of *Douglas* (which it does not), the deprivation of counsel runs afoul of the Constitution.

B. Michigan's Scheme Unconstitutionally Abrogates a Traditional, Firmly Rooted Practice of Providing Indigents Counsel in Their First Appeal on the Merits

Citing *Smith v. Robbins*, 528 U.S. 259 (2000), Michigan argues that the denial of counsel to those who plead guilty is permissible because Michigan is free "to experiment with procedures for handling criminal appeals." Opp. Cert. 26. In *Smith*, the Court recognized that states are free to adopt different procedures concerning appointed counsel's ability to decline to pursue a frivolous appeal so long as the procedures adequately safeguard a defendant's right to counsel. 528 U.S. at 265. The Court, however, distinguished between procedures that protect the *effectiveness* of counsel versus those that deny counsel in the first instance. *Id.* at 286. Michigan's system does the latter, denying counsel outright.

In any event, even when viewed purely as a procedural issue, the "procedure" under MCL § 770.3a—which abrogates a traditional practice employed in every state—violates due process. In recent years, this Court has recognized that departures from traditional procedures independently may violate due process if the change "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Cooper v. Oklahoma*, 517 U.S. 348, 367 (1996) (citation omitted); *Medina v. California*, 505 U.S. 437, 445 (1992) (citations omitted). In *Cooper*, for instance, Oklahoma adopted a procedure that presumed a criminal defendant to be competent unless the defendant proved incompetence by clear and convincing evidence. 517 U.S. at 350. Because of a longstanding and "near-uniform application" of a preponderance of the evidence standard by federal and state courts, this Court determined that Oklahoma's departure violated due process. *Id.* at 361-62.

To determine whether a state's procedure offends a deeply rooted fundamental principle of justice, this Court has compared the practice to those employed at common law, *Medina*, 505 U.S. at 445-46, and to contemporary practice, *see Cooper*, 517 U.S. at 360 ("Contemporary practice demonstrates that the vast majority of jurisdictions remain persuaded that the heightened standard of proof imposed on the accused in Oklahoma is not necessary to vindicate the State's interest. . . ."). Here, the relevant starting point is March 18, 1963, the day this Court decided *Gideon* and *Douglas*. Such decisions are counted among the few "watershed rules of criminal procedure" that "are implicit in the concept of ordered liberty" so as to have retroactive effect. *Beard v. Banks*, 124 S. Ct. 2504, 2513-14 (2004) (right to counsel under *Gideon* retroactive under *Teague* exception because it altered "understanding of the bedrock procedural elements"); *accord Adams v. Illinois*, 405 U.S. 278, 280-81 (1972) (plurality) (recognizing the retroactive effect of the right to counsel rules under both *Gideon* and *Douglas*).[8]

Since *Douglas* was decided, no other jurisdiction—not one—has deprived an indigent defendant the appointment of counsel on a first appeal on the merits, even when the state permits the first appeal only by leave. *See Bundy v. Wilson*, 815 F.2d 125, 136-42 (1st Cir. 1987) (describing appellate systems in all U.S. jurisdictions); Pet. Br. 24-25 (noting that only two states do not allow a first appeal of right and all require appointment of counsel for the first appeal). Over thirty years ago, a Michigan federal court explicitly rejected the notion that a so-called "discretionary" first appeal permits the deprivation of counsel. *Mata v.*

8. *See also Williams v. United States*, 401 U.S. 646, 653 n.6 (1971) (plurality) (same); *Smith v. Crouse*, 378 U.S. 584, 584 (1964) (per curiam) (summarily reversing state supreme court judgment that *Douglas* rule was not retroactively applicable); *Daegele v. Kansas*, 375 U.S. 1, 1 (1963) (per curiam) (similar).

Egeler, 383 F. Supp. 1091, 1093-94 (E.D. Mich. 1974). Most notable, in *Ross v. Moffitt*, this Court held that due process did not require appointment of counsel in second-tier, truly "discretionary" direct appeals based in part on the assumption that in all first-tier appeals an indigent's "claims had 'once been presented by a lawyer and passed upon by an appellate court.'" 417 U.S. at 615.

Courts, scholars, counsel, and defendants likewise assume that from the initiation of charges through the first appeal "lawyers in criminal courts are necessities, not luxuries." *Gideon*, 372 U.S. at 344. Accordingly, independent of the due process and equal protection principles in *Douglas*, or the Sixth Amendment protections of *Gideon*, Michigan's scheme violates the Constitution.

II. Indigent Defendants Lack the Education and Literacy Skills to Represent Themselves Meaningfully on First Appeal

Michigan defends MCL § 770.3a on the ground that indigent defendants can adequately protect their rights on first appeal because the State provides them transcripts and a "nontechnical and easily understood" form Application to appeal. *See* Opp. Cert. 20. Michigan ignores the capabilities of indigent appellants, downplays the complexity of appeals following guilty pleas, and minimizes the vital interests at stake.

A. Profile of an Indigent Appellant: An Incarcerated High School Dropout Lacking Even Basic Literacy Skills

This Court long has recognized the inability of laymen to represent themselves effectively at critical stages in the criminal justice process, including a defendant's first appeal as of right. *E.g.*, *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by

counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law."); *Gideon*, 372 U.S. at 344-45 (quoting same); *accord Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938) (noting "a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself"); *Argersinger v. Hamlin*, 407 U.S. 25, 32 n.3 (1972) ("That which is simple, orderly and necessary to the lawyer—to the untrained layman—may appear intricate, complex, and mysterious.") (citation omitted); *Evitts*, 469 U.S. at 393 ("[T]he services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits.") (citation omitted). Michigan's statute, however, does not target the average layperson. It denies counsel to indigent defendants who plead guilty. As a group, these individuals are the poorest, least educated, and least literate members of our society.

According to Justice Department statistics, about 80% of state felony defendants use court-appointed lawyers. *See* Caroline Wolf Harlow, U.S. Dep't of Justice, *Defense Counsel in Criminal Cases* 1, 5 (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf (analyzing data on felony defendants in state courts in 75 largest counties). The typical indigent defendant—like Petitioner Halbert—pleads guilty or nolo contendere and is incarcerated. *See id.* at 6, tbls.10-11 (71% of indigent defendants plead guilty and 71.3% of convicted indigent defendants are incarcerated); *accord Michigan Supreme Court 2003 Annual Report, Circuit Court Statistical Supplement* 3, *available at* http://www.courts.michigan.gov/scao/resources/publications/statistics/2003/circuitcaseload report2003.pdf (last visited Feb. 16, 2005) (52,913 felony criminal cases disposed of by verdict or by plea in 2003; 49,833 were by guilty plea).

The incarcerated indigent, like the rest of the inmate population, is more likely to be young, male, and a member

of a minority group. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Additional Corr. Facts at a Glance*, *at* http://www.ojp.usdoj.gov/bjs/gcorpop.htm (last revised May 28, 2004); *accord* Mich. Dep't of Corr., *2002 Annual Report* 21, *available at* http://www.state.mi.us/mdoc/jobs/pdfs/2002Annual Report2.pdf (last visited Feb. 16, 2005) (average age of Michigan state male prisoner in 2002 was 35 years old; 57.7% of prison population were members of minority groups). Odds are, like 68% of the prison population, he is a high school dropout or received no high school education at all. *See* Caroline Wolf Harlow, U.S. Dep't of Justice, *Educ. & Corr. Populations* 1 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ecp.pdf.[9]

Further, there is an extraordinarily high probability that he is functionally illiterate. *See generally* U.S. Dep't of Educ., *Literacy Behind Prison Walls* (1994), *available at* http://nces.ed.gov/pubs94/94102.pdf [hereinafter Literacy Report];[10] *accord Kowalski v. Tesmer*, 125 S. Ct. 564, 574

9. This report analyzed data showing that 68% of inmates in state prisons have not completed high school, compared to 18% of the general population. *Educ. & Corr. Populations, supra*, at 1. The report also found that 14.2% of state inmates had an eighth-grade education or less. *Id.* at 2, tbl.1. While comparable data is not generally available concerning Michigan inmates, available statistics reflect that most of the participants in Michigan correctional educational services are enrolled in programs that teach Adult Basic Education (0 to 8th grade). *See* Mich. Dep't of Corr., *2002 Statistical Report* F-9-F-11, *available at* http://www.michigan.gov/documents/2002Stat_114829_7.pdf (last visited Feb. 16, 2005). Conversely, not one inmate enrolled in the prison education program in 2002 was receiving college level training. *Id.*

10. The Literacy Report, by the National Center for Education Statistics, determined that 7 out of 10 inmates are functionally illiterate. *See* Literacy Report at xviii, 10, 17. Specifically, relying on data from the National Literacy Survey, the report evaluated the

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(2004) (Ginsburg, J., dissenting) (discussing Literacy Report). This means that while the indigent defendant may have some minimal reading and writing abilities, he cannot perform a wide range of routine tasks. According to the leading literacy study, for instance, he likely lacks the ability to:

- enter information on an application for a social security card, Literacy Report at 10, 17;
- use a bus schedule, *id.* at 10, 17;
- write a letter explaining an error on a credit card bill, *id.* at 10, 17;
- determine the difference in price between two tickets, *id.* at 10, 17; and
- identify information in a bar graph.

Id. at 10, 17.

Beyond education and literacy, the indigent defendant is more likely to be hindered by mental health problems. Nationwide studies show that about 16% of all state inmates are identified as mentally ill and one in ten receives psychotropic medication. Allen J. Beck & Laura M. Maruschak, U.S. Dep't of Justice, *Mental Health Treatment in State Prisons, 2000* 3-4 (July 2001), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/mhtsp00.pdf. According to

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abilities of the nation's inmate population in three areas of literacy: prose, document, and quantitative literacy. *Id.* at 15-16. Participants were rated on a scale of 1 to 5 on their capabilities within each of these three categories. *Id.* at 9 & fig.1. The study showed that approximately 70% of inmates fell into the two lowest levels (Levels 1 and 2) for each literacy category. *Id.* at 17. Approximately one-third of inmates, for instance, scored at only Level 1 in all categories. *Id.* at 20. The average proficiency level for all inmates was Level 2, the second-to-bottom level for each literacy category. *Id.* at 19, tbl.2.3. Conversely, fewer than 1% of inmates performed at the top of the literacy scale. *Id.* at 19-20.

the Michigan Department of Corrections, 5.9% of the total prison population were being treated for serious mental illness in 2002. Michigan Dep't of Corrections, *Prisoner Mental Health Servs., available at* http://www.michigan.gov/corrections/0,1607,7-119-9741_9744—,00.html (last visited Feb. 17, 2005).

In many ways, the typical indigent appellant is the picture of Petitioner Antonio Halbert: a poor, special education student with learning disabilities and mental impairments. *See* JA 61-62. It is such individuals who Michigan claims can represent themselves meaningfully on their first and only appeal on the merits following their pleas. That position, particularly when considered in light of Michigan's complex sentencing laws and appellate procedures, defies reality.

B. Portrait of an Appeal Following a Guilty Plea: Complicated Errors and Procedural Pitfalls

Contrary to the myth that appeals following guilty pleas are frivolous (*see* Opp. Cert. 26), the success rate of these appeals is relatively high. *See* Mara Matuszak, Note, *Limiting Michigan's Guilty and Nolo Contendere Plea Appeals*, 73 U. Det. Mercy L. Rev. 431, 440-41, 443 (1996); *see also* Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 Hastings Const. L.Q. 127, 190-91 (1995) (discussing success rates of criminal appeals and 1992-93 study of two appellate courts which found that 24% of appeals after pleas received some form of relief). By some accounts, anywhere from 12% to 47% of Michigan appeals following guilty pleas result in some form of relief. Matuszak, *supra*, at 443 (discussing 1994 report that set forth studies by the Michigan State Appellate Defenders Office and the Michigan Appellate Assigned Counsel System of appeals taken before MCL § 770.3a took effect).

It also is untrue that these appeals are simple. Appeals following guilty pleas involve complex and vital issues and protect both the individual appellants and the system at large.

As recent events make clear, sentencing issues are common on appeal. *See generally Blakely v. Washington*, 124 S. Ct. 2531 (2004); *see also United States v. Booker*, 125 S. Ct. 738 (2005); National Center for State Courts, *Understanding Reversible Error in Criminal Appeals* 18-19 (1989) (study of appeals in five state appellate courts finding high rate of sentencing issues on appeal);[11] Matuszak, *supra*, at 438-39 (discussing report finding that the majority of appeals following guilty pleas in Michigan involve sentencing issues). Sentencing guidelines, like Michigan's, "are often so bewilderingly complex as to virtually guarantee appellate issues in a high percentage of sentencing decisions." Calhoun, *supra*, at 184. Moreover, unlike most other states, Michigan requires a criminal defendant to raise complex issues such as ineffective assistance of counsel as part of the first, direct appeal.[12]

Thus, an effective system for first appeals provides a vital check on criminal justice proceedings, particularly the integrity of the plea and sentencing process. Michigan's scheme leaves this safeguard largely in the hands of unrepresented indigents on the premise that they can fend

11. According to the National Center for State Courts's study:

> Sentencing issues are raised in one-quarter of the appeals, and it appears that sentencing issues are not simply "add-on" issues to appeals that would otherwise have been filed; a great number of appeals are filed raising only sentencing issues. In addition, sentencing issues have a high error rate. In fact, when sentencing is raised, the courts find error 25 percent of the time.

National Center for State Courts, *supra*, at 18-19. Similarly, one survey found that 65% of federal criminal appeals in 1994-95 involved sentencing issues. *See* Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 Nw. U. L. Rev. 1441, 1491 (1997).

12. *See generally People v Ginther*, 212 N.W.2d 922 (Mich. 1973).

for themselves. A brief review of what that means, however, shatters this notion.

1. Finding and Arguing a Point of Error

The indigent defendant who pleads guilty has only twenty-one days to file a timely "Application for Leave to Appeal," which identifies and argues all points of error. MCR 7.205(A). Issues not raised by the indigent defendant are waived. MCR 7.205(D)(4). On his own, therefore, the indigent defendant quickly will have to analyze an array of potential errors, including: What issues were lost as the result of the plea?[13] Did the government explicitly or implicitly violate the plea agreement?[14] Did the judge meet all statutory and procedural requirements to ensure the plea was voluntary?[15] Were there any scoring or other errors under the Michigan Sentencing Guidelines?[16] Did the trial court rely on inaccurate information in sentencing?[17] Did the State fulfill its obligations in providing a transcript or other

13. *See, e.g., Guilty Pleas*, 91 Geo. L.J. 362, 372-79 (2003) (reviewing rights retained and lost as result of guilty plea); *see also People v. Bulger*, 614 N.W.2d 103, 133-34 (Mich. 2000) (Cavanagh, J., dissenting) (discussing errors that survive guilty plea in Michigan).

14. *See, e.g., People v. Nixten*, 454 N.W.2d 160, 161 (Mich. Ct. App. 1990) (finding error where government explicitly failed to fulfill agreed sentence recommendation); *United States v. Gonczy*, 357 F.3d 50, 54 (1st Cir. 2004) (finding error where government implicitly failed to fulfill agreed sentence recommendation by making statements undercutting recommended sentence).

15. *See* MCR 6.302(B) (providing information court must give defendant who pleads guilty); MCR 6.425(E) (providing information court must give defendant at sentencing).

16. *See, e.g., People v. Knolton*, No. 237796, 2003 WL 1343001, at *4 n.28 (Mich. Ct. App. Mar. 11, 2003) (remanding for resentencing for guidelines error).

17. *See, e.g., People v. Baker*, 327 N.W.2d 403, 409 (Mich. Ct. App. 1982) (remanding for reconsideration of sentence where trial court may have relied on inaccurate information).

materials required by law?[18] And did counsel provide effective assistance in the plea and sentencing process?[19] This task must be accomplished in less than a month by an individual who typically cannot "[l]ocate two features of information in [a] sports article." Literacy Report, *supra*, at 10 (identifying abilities of individuals in prose literacy Level 2, the average proficiency level for inmates).

Simply determining whether a sentencing error exists would give most lawyers pause. To identify such an error, an indigent defendant would have to wander alone[20] through Michigan's comprehensive statutory scheme, which includes

18. *See People v. Plaza*, 617 N.W.2d 687, 688 (Mich. 2000) (Kelly, J., dissenting) (noting that court should have remanded because indigent was denied transcript); *see id.* at 687 (Corrigan, J., concurring) (noting that remand unnecessary because indigent failed to raise issue in *pro se* application for appeal).

19. *See, e.g., Tollett v. Henderson*, 411 U.S. 258, 266-67 (1973) (plea does not foreclose ineffective assistance of counsel claims).

20. While MCL § 770.3a provides an indigent defendant with appellate counsel when a sentence exceeds the guideline range, it does not require counsel for other errors, such as an "error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL § 769.34(10); *see also id.* § 770.3a(2)(b) (requiring counsel where sentence exceeds guidelines range); *id.* § 770.3a(3) (permitting but not requiring appointment of counsel for some sentencing errors). If the sentence exceeds the guidelines range, the court must advise the defendant that he is entitled to court appointed counsel. MCR 6.425(E)(2)(b)(i). The court also must state the reasons for the departure on the record, MCL § 769.34(3), and advise the defendant orally and in writing that he may appeal the sentence on the basis of the departure. *See* MCR 6.425(E)(4). That process assumes, however, that the court itself is aware that the sentence exceeded the guidelines, which is not always the case given the complexity of the system. *See Knolton*, 2003 WL 1343001, at *4 n.28 (remanding for resentencing when trial court failed to realize that sentence was outside guidelines range and thus failed to follow procedures for guidelines departures).

nearly fifty provisions identifying Offense Variables, MCL §§ 777.31 to 777.49a, Prior Record Variables, MCL §§ 777.50 to 777.57, and multiple sentencing grids, MCL §§ 777.61-777.69. He also would have to ensure he is using the guidelines in effect at the time of his offense. *See* MCL § 769.34(2). This task will not be easy given the frequent changes to Michigan's sentencing laws. *See* Sheila Robertson Deming, *Michigan's Sentencing Guidelines*, 79 Mich. Bar J. Online 6 (2000) (noting legislative amendments to guidelines in ten different 1999 public acts with five different effective dates), *available at* http://www.michbar.org/journal/article.cfm?articleID=92&volumeID =8&viewType=archive; *see also People v. Babcock*, 666 N.W.2d 231, 235-37 (Mich. 2003) (providing background of Michigan's replacement of judicial sentencing guidelines with statutory guidelines).

To help tackle the difficult statutory scheme, the indigent defendant may turn to the State Court Administrative Office's "Guidelines Manual." *See* Mich. Sentencing Guidelines Manual (2005), *available at* http://courts.michigan.gov/mji/resources/sentencing-guidelines/sg.htm. That the "user-friendly" guide is over one hundred seventy pages long, contains seven pages of instructions, four pages of definitions, and an array of grids and offense charts, reflects the daunting task facing a lawyer reviewing the propriety of a sentence, let alone someone who typically cannot understand a bar graph or solve basic math problems. *See* Literacy Report, *supra*, at 10 (identifying abilities of individuals in document literacy Levels 2 and 3 and quantitative literacy Level 3, levels at or above the average inmate). Petitioner's improper sentence reflects that even those versed in the guidelines, including probation officials, counsel, and trial judges, are prone to error. *See* Pet. Br. 35-36 (discussing errors in Petitioner's sentence under the guidelines).

After making his way through the Manual, the indigent defendant would have to research judicial interpretations of the guidelines. In the last few years, the Michigan Supreme Court had to clarify "unfamiliar or confusing" guideline requirements, *People v. Stauffer*, 640 N.W.2d 869, 871 (Mich. 2002), and even included a twelve paragraph appendix to one of its decisions to aid practitioners on Michigan's intricate sentencing procedures. *Babcock*, 666 N.W.2d at 244-45. Though the Michigan Supreme Court summarily found in dicta that the State's guidelines are unaffected by *Blakely*, the court is somewhat divided on the issue,[21] and has yet to fully address *Blakely* or the implications of *Booker*. Surely, an indigent defendant cannot seriously be expected to develop *Blakely* and *Booker*-related arguments given the complexity of the issues.

Assuming, however, that the indigent defendant could in fact identify an error in sentencing—to say nothing of the many other potential errors hidden from the untrained eye[22]—he would then need to decide *whether* to appeal. For instance,

21. In *People v. Claypool*, 684 N.W.2d 278 (Mich. 2004), the Michigan Supreme Court concluded in a footnote that "the Michigan system is unaffected by the holding in *Blakely*. . . ." *Id.* at 286 n.14. The statement was in response to Chief Justice Corrigan's opinion concurring in part and dissenting in part, which expressed concern that "the majority's sweeping language regarding judicial powers to effect departures (not limited to downward departures) will invite challenges to Michigan's scheme; it appears to conflict with principles set out in *Blakely*." *Id.* at 287 (Corrigan, C.J., concurring in part and dissenting in part). *See also id.* at 296 (Kelly, J., concurring in part and dissenting in part) ("I do not believe the Court should take a position on the application of *Blakely v. Washington* to Michigan's sentencing scheme. The issue was neither raised nor briefed in this case.").

22. *See Bulger*, 614 N.W.2d at 134-35 (Cavanagh, J., dissenting) (providing samples of actual Michigan guilty plea appeals reflecting complex issues in addition to sentencing).

he likely will be unaware that if he succeeds in having his sentence overturned, he may be subject to longer incarceration upon resentencing. Without the advice of counsel to explain the risks, the indigent defendant likely will proceed with an appeal that may be contrary to his interests. If he does proceed on his own, he will face his next hurdle: articulating the error in writing and meeting all Michigan procedural requirements to perfect the appeal.

2. Complying with Michigan's Appellate Rules

The right to counsel on the first merits appeal is important not only to identify and present the substantive legal grounds, but also for "a different, albeit related, aspect of counsel's role, that of expert professional whose assistance is necessary in a legal system governed by complex rules and procedures for the defendant to obtain a decision at all—much less a favorable decision—on the merits of the case." *Evitts*, 469 U.S. at 394 n.6. Like most states, Michigan's appellate procedures are complex. The procedures for perfecting appeals following guilty pleas are no exception.

Under MCR 7.205, the indigent defendant's so-called "Application" for appeal must be filed within twenty-one days from entry of the judgment, MCR 7.205(A), though the court may accept an untimely filing up to one year after judgment. *See* MCR 7.205(F)(1)-(4). Any issue not raised in the Application is waived, both in state court actions,[23] and in subsequent federal habeas corpus proceedings. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999).

To meet the filing requirements, the indigent defendant must submit five copies of his Application, "stating the date and nature of the judgment or order appealed from; concisely

23. MCR 7.205(D)(4); *Plaza*, 617 N.W.2d at 687 (Corrigan, J., concurring) (indigent's failure to raise issue in *pro se* application for appeal justified Michigan Supreme Court's denial of review of claimed erroneous deprivation of transcript).

reciting the appellant's allegations of error and the relief sought; [and] setting forth a concise argument, conforming to MCR 7.212(C)...." MCR 7.205(B)(1). MCR 7.212(C), in turn, sets forth the required contents of appellate briefs. Specifically, the indigent's appeal from a plea-based conviction must, using the specific format required under the rule, include a statement of jurisdiction, the standard of review, record citations, the relevant statutes or constitutional provisions, a statement of the issues, and a legal argument. MCR 7.212(C)(4)-(7).

The indigent defendant also must obtain and file multiple copies of several documents, including the judgment, docket entries, and certain transcripts, *see* MCR 7.205(B), and must either tender a $375 filing fee or submit a motion to waive fees and an affidavit of indigency. *See* MCL § 600.321(1)(a); MCR 2.002.

Unlike defendants with financial resources, most indigent defendants who plead guilty will not have a lawyer-like Application and supporting brief. Nor will they have counsel's insights regarding the issues that should be raised and the risks of not raising a particular issue. Instead, Michigan law provides defendants who plead guilty a three-page form Application created by the State Court Administrative Office. MCR 6.425(E)(2)(d); *see* JA 66-71 (Petitioner's Application).[24]

Perhaps recognizing that few unrepresented indigents will meet the twenty-one day filing deadline, the form begins with a "Statement of Delay" section for the defendant to explain why the filing is untimely. *See* JA 66. The form also requires entry of information such as "Charge Codes, MCL citation/PACC Code," JA 67, and includes a detailed instruction sheet concerning all of the documents needed to

24. The current version of the form is available at http://courts.michigan.gov/scao/courtforms/appeals/cc405.pdf (last visited Feb. 16, 2005).

accompany the filing. Although following these directions might not pose a major challenge for a college graduate, the average indigent inmate has very low "document literacy" skills, and typically cannot complete an application for a social security card or enter information on an automobile maintenance record form. Literacy Report, *supra*, at 10, 17.

Aside from these procedural formalities, the form requires the indigent defendant to set forth each of the following: the questions presented for appeal, the statement of the facts, the arguments, and the relief requested. JA 68-71. Regarding the legal argument section, the indigent defendant is advised to "state the law that supports your position and explain how the law applies to the facts of your case." JA 69. That is the extent of guidance the indigent defendant is provided on making his substantive case for appeal.[25]

The procedural hoops only become more difficult if the indigent defendant has an ineffective assistance of trial counsel claim. As a prerequisite to appellate review, the defendant typically must raise an ineffective assistance of counsel claim in a motion to withdraw his plea. *People v. Ginther*, 212 N.W.2d 922, 925 (Mich. 1973); *accord People v. Johnson*, 373 N.W.2d 263, 266 (Mich. Ct. App. 1985) (per curiam). This motion must be filed within twenty-one days of judgment. MCR 6.311(A); *see also* MCR 7.205(A). Or, the indigent defendant can take his chances that leave to

25. In this regard, the "simplicity" of the instructions can in fact be a roadmap to waiver, given some of the heightened preservation requirements for later review. *See, e.g., Howell v. Mississippi*, 125 S. Ct. 856, 859 (2005) (per curiam) (preservation of federal claim in this Court or on federal habeas corpus requires defendant to identify with specificity doctrinal basis for claim); *Baldwin v. Reese*, 124 S. Ct. 1347, 1350 (2004) (reference to "ineffective assistance" of counsel in state court filing insufficient to preserve federal ineffective assistance of counsel claim).

appeal will be granted. If it is, a defendant may file a motion to withdraw a plea within fifty-six days "after the commencement of the time for filing the defendant-appellant's brief." MCR 7.208(B)(1).

In addition to the written motion, the indigent defendant must present "a testimonial record at the trial court level ... which evidentially supports his claim and which excludes reasonable hypotheses consistent with the view that his trial lawyer represented him adequately." *Ginther*, 212 N.W.2d at 925 (citation omitted). Typically, this burden requires an indigent defendant to seek an evidentiary hearing on the ineffective assistance claim. *Id*. Thus, the indigent defendant must file a motion for an evidentiary hearing with the trial court. *Id*.; *see also People v. Mitchell*, 560 N.W.2d 600, 612 (Mich. 1997) (noting trial counsel is "necessary witness" at ineffective assistance of counsel hearing). Failure to comply with these procedural steps can waive the ineffective assistance claim. *People v. Marji*, 447 N.W.2d 835, 839 (Mich. Ct. App. 1989) (finding defendant waived ineffective assistance of trial counsel claim by failing to move for a new trial or evidentiary hearing before the trial court); *People v. Lawson*, 335 N.W.2d 43, 44 (Mich. Ct. App. 1983) (per curiam) ("[T]his Court will not review a claim for ineffective assistance of counsel based on allegations not supported by the record where no motion for a new trial or for an evidentiary hearing or a motion for remand has been filed.") (citation omitted).

Here, for example, Petitioner filed "a handwritten motion to withdraw pleas . . . prepared by another prisoner without benefit of the trial record." JA 61. Although Petitioner managed to file this motion within the allotted twenty-one days, he did not include his ineffective assistance claim. JA 43. The court incorrectly denied his motion as "not timely." JA 43. The court likely based its decision on Petitioner's failure to demonstrate "good cause" to withdraw

his plea, which could have been satisfied had the ineffective assistance claim been presented properly.

Petitioner claims that trial counsel was ineffective in part for failing to object to the trial court's erroneous sentencing determination. Counsel's decision to object at sentencing is "typically viewed as a tactical decision." *People v. Miller*, No. 221852, 2001 WL 718585, at *2 (Mich. Ct. App. June 26, 2001) (per curiam) (reversing for new sentence based on ineffective assistance claim where trial counsel failed to object to trial court's scoring error). A decision on tactics necessitates trial counsel's testimony at a *Ginther* hearing—something wholly outside the competence of an indigent defendant (or jailhouse lawyer).

Appellate counsel thus serves an essential function—providing a professional second-look at trial counsel's performance, at the government's conduct, and at sentences that may be improperly based—hardly simple or trivial issues.

C. The "Protections" Provided Under Michigan's Scheme Are Unrealistic and No Substitute for Counsel

Michigan suggests that a poor defendant will be able to overcome the obstacles above because he "will have sufficient materials available to permit him to present his claims fairly and thus receive a meaningful appeal." Opp. Cert. 20. The flaw with this, of course, is that "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser v. United States*, 315 U.S. 60, 76 (1942), *superseded on other grounds by statute as recognized in Bourjaily v. United States*, 483 U.S. 171, 181 (1987). In any event, the materials and resources available to indigent appellants in Michigan are scarcely better than no assistance at all.

Michigan stresses that indigent defendants receive free court documents and transcripts and the "nontechnical and easily understood" form Application for appeal discussed above. Opp. Cert. 20. This Court previously has recognized that such materials are no substitute for having a lawyer cull the record, identify errors, and craft an appellate brief. *See Swenson v. Bosler*, 386 U.S. 258 (1967) (per curiam). In *Swenson*, Missouri argued that no counsel was necessary to indigents on first appeal of right because the State provided the indigent defendant a free transcript and trial counsel had filed a "motion for new trial which specifically designated the issues which could be considered on direct appeal." *Id.* at 259. This Court rejected the argument, concluding that "[t]he assistance of appellate counsel in preparing and submitting a brief to the appellate court which defines the legal principles upon which the claims of error are based and which designates and interprets the relevant portions of the trial transcript" are benefits that cannot be denied to a defendant simply because he is poor. *Id.*; *see also Evitts*, 469 U.S. at 394 (citing *Swenson* for importance of preparation of brief by attorney in first appeal of right). Nor will an indigent defendant, as reflected in Petitioner's case, in most cases have the assistance of written motions. And in the few cases where motions exist, the papers likely will not adequately address appellate issues. *See Bulger*, 614 N.W.2d at 139-40 (Cavanagh, J., dissenting) (discussing why motions are inadequate substitutes for an appellate brief).

Given their limited abilities and the minimal materials available to assist, many indigent defendants will, as Petitioner did, turn to jailhouse lawyers or use briefs of other parties that circulate around the prison. That hardly provides a meaningful appeal. "It is indisputable that prison 'writ writers' . . . are sometimes a menace to prison discipline and that their petition[s] are often so unskillful as to be a burden on the courts which receive them." *Johnson v. Avery*, 393

U.S. 483, 488 (1969); *see also id.* at 499-500 (White, J. dissenting) (discussing burdens on courts and prisons from jailhouse lawyers and risks to "clients" of prisoners acting as counsel). Though the inmate who assisted Petitioner managed to identify the right to counsel issue in this appeal, that was only after the issue was well-known and fully briefed in *Kowalski*. Other errors will not be so easily identifiable, nor will briefing be so readily available to use as a guide. Indeed, the inmate who helped Petitioner omitted several meritorious claims. *See* Pet. Br. 36-37.

Even when briefs of others are available, this Court has rejected arguments that the briefs of other defendants are sufficient to protect the right to counsel. In *Penson v. Ohio*, for example, the Court rejected Ohio's argument that a defendant who received no appellate counsel was adequately protected by briefs filed by co-defendants: "One party's right to representation on appeal is not satisfied by simply relying on representation provided to another party. . . . A criminal appellant is entitled to a single-minded advocacy for which the mere possibility of a coincidence of interest with a represented codefendant is an inadequate proxy." 488 U.S. at 86-87.

Some indigent defendants, of course, may find a real lawyer willing to take their appeals *pro bono*. Despite *pro bono* work being done in record numbers throughout this country, the bar simply cannot meet the needs of indigent criminal defendants on a voluntary basis. *Cf.* Simran Bindra & Pedram Ben-Cohen, *Public Civil Defenders: A Right To Counsel for Indigent Civil Defendants*, 10 Geo. J. on Poverty L. & Pol'y 1, 6 (2003). For example, despite the fact that Maine has the "highest pro bono rate in the country amongst its lawyers, a study showed that it was impossible for the State's lawyers to volunteer enough time to meet the legal needs of its indigents." Katja Cerovsek & Kathleen Kerr, *Opening the Doors To Justice: Overcoming The Problem of*

Inadequate Representation for the Indigent, 17 Geo. J. Legal Ethics 697, 697-98 (2004) (citation omitted); *see also id.* at 697 (noting that there is "only one lawyer for every 9,000 Americans whose low income would qualify for civil legal aid"). The inability of *pro bono* to fill this gap may be even greater in the criminal context given the complexity of the law and the understandable reluctance of those untrained in this field to take on a case where they lack the experience or background to do so effectively. *Cf.* Robert J. Martin & Walter Kowalski, *"A Matter of Simple Justice": Enactment of New Jersey's Municipal Public Defender Act*, 51 Rutgers L. Rev. 637, 651-52 (1999) (discussing limitations of using *pro bono* counsel for criminal cases).

In sum, even the simplified example above confirms that "[t]o prosecute the appeal, a criminal appellant must face an adversary proceeding that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant—like an unrepresented defendant at trial—is unable to protect the vital interests at stake." *Evitts*, 469 U.S. at 396. All the more so to the poor, functionally illiterate defendants targeted by MCL § 770.3a.

CONCLUSION

The judgment of the Michigan Court of Appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ANTONIO DWAYNE HALBERT,

Petitioner,

v.

STATE OF MICHIGAN,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

BRIEF OF NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Legal Aid and Defender Association (NLADA), a nonprofit corporation, works to support indigent defender services and civil legal assistance to those who cannot afford lawyers. Through its Defender Legal Services division, NLADA provides training, information, and technical assistance to public defender offices and others who provide legal services to indigent criminal defendants. NLADA's American Council of Chief Defenders is a leadership council that is dedicated to promoting fair justice systems and ensuring that citizens who are accused of crimes have adequate legal representation. NLADA has approximately 680 program members, representing 12,000 lawyers, including nonprofit organizations, government agencies, legal aid organizations, and law firms; NLADA also has approximately 1,000 individual members.

NLADA traces its roots to the National Alliance of Legal Aid Societies, which was formed by 15 legal aid societies in 1911. It is the oldest and largest national nonprofit membership association that devotes its resources exclusively to serving the equal justice community.

NLADA is a leading voice in public policy debates on equal justice issues. In pursuit of that effort, NLADA has filed *amicus curiae* briefs in major constitutional cases before

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1. No counsel for a party authored this brief in whole or in part. No person or entity other than the National Legal Aid and Defender Organization and its counsel made a monetary contribution to the preparation or submission of this brief. Petitioner and respondent have consented to the filing of this brief and their letters of consent have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.3(a).

this Court involving the administration of the criminal justice system and the right to counsel.

NLADA submits this *amicus curiae* brief because it believes that the Michigan statute's denial of appellate counsel to indigent defendants who enter guilty or no contest pleas violates equal protection guarantees and will leave indigent defendants unable to mount any meaningful challenge to excessive sentences or other errors in the plea proceedings. NLADA is particularly concerned that the state's position, under which states would be free to condition pleas by indigent defendants – and indigent defendants only – on a waiver of the right to appellate counsel, even if that right is reaffirmed as a constitutional guarantee for indigent defendants who enter guilty or no contest pleas, would have serious constitutional and practical ramifications.

SUMMARY OF ARGUMENT

The State of Michigan, in defending its denial of counsel to indigent defendants who plead guilty, except through a discretionary appointment in very limited circumstances, *e.g.*, *People v. Harris*, 681 N.W.2d 653 (Mich. 2004), has argued, both in *Kowalski v. Tesmer*, __ U.S. __, 125 S. Ct. 564 (2004), and here, that it is free to compel waivers of the right to appointed appellate counsel when indigent defendants plead guilty. Brief in Opposition at 20 (Halbert's "pleas constitute a valid waiver of any right to appointed counsel"). Thus, according to Michigan, even if the Court holds that the right to counsel obtains on appeals from plea-based convictions, indigent defendants may lawfully be compelled to waive that right as an essential precondition to acceptance of a guilty or no contest plea.

The statutory provision that requires a trial court to ascertain that an indigent defendant entering a plea understands that the defendant will not be provided with appointed appellate counsel is an essential part of the Michigan statute's overall fabric. The statute's unconstitutionality dooms the state's attempt to salvage the waiver provision as a freestanding enactment, under which Michigan can compel waivers of appellate counsel. But even if that were not so, the broader question is whether a state (or an individual judge) can compel a waiver of the right to appointed appellate counsel as a precondition for acceptance of a plea. The equal protection violation that arises from the state's "waiver" theory is identical to, if not more egregious than, that which arises from Michigan's attempt to legislate away the constitutional right of indigent defendants to appointed appellate counsel in the first instance.

The state would have the Court rule that indigent defendants – and *only* indigent defendants – can be compelled to surrender their right to appellate counsel if they wish to enter a guilty or no contest plea. A moneyed defendant would, of course, be free to retain appellate counsel on appeal from a plea-based conviction. Such invidious discrimination is utterly inconsistent with the principles that sustain to the right to appointed appellate counsel in the first instance.

Carried to its logical extent, of course, the state's waiver theory would allow a state to strip an indigent defendant of *all* tools with which to appeal from a plea-based conviction, *e.g.*, the right to a transcript at state expense, or to force indigent defendants to pay filing fees as a prerequisite to an appeal, all as "conditions" of a plea. The vast majority of felony charges against indigent defendants are resolved by pleas, and the illusory choice of going to trial so as to secure the right to counsel is no choice at all. More to the point, the state would foist this "choice" *only* upon indigent defendants.

STATEMENT OF THE FACTS

NLADA adopts the Statement of the Facts in respondent's brief.

ARGUMENT

Michigan Cannot Compel Indigent Defendants, And Only Indigent Defendants, To Waive Their Constitutional Right To Appointed Appellate Counsel As A Precondition For Entering A Plea Of Guilty Or No Contest.

A. The Unconstitutionality of Section 770.3a Pretermits Enforcement of Any Purported Waiver of the Constitutional Right to Counsel Under the Michigan Statute.

Article I, Section 20, of the Michigan Constitution (as amended in 1994), requires leave of court for an appeal of a criminal conviction following a guilty or no contest plea. In 2000, the Michigan legislature enacted a statute to limit stringently the right of indigent defendants to appellate counsel, directing that indigents "shall not have appellate counsel appointed for review of the defendant's conviction or sentence" in seeking leave to appeal. MICH. COMP. LAWS § 770.3a(1). Counsel may be appointed only if the prosecution takes an appeal, the sentence is beyond the outer limits of the guideline range, the defendant has entered a conditional appeal, or if leave is granted for an appeal. MICH. COMP LAWS § 770.3a(2). There is no dispute here that the 2000 statute was intended to – and does – deny appointed counsel to most indigent defendants who plead guilty or no contest. *People v. Harris*, 681 N.W.2d 653 (Mich. 2004).

Michigan Court Rule 6.302(B), in compliance with the statute, MICH. COMP. LAWS § 770.3a(4), requires that a trial court that accepts a guilty or no contest plea to "advise the defendant and . . . determine whether the defendant understands": (i) that "any appeal from the conviction and sentence" is by "application for leave to appeal and not by right"; and (ii) that the defendant is not entitled to appointed counsel except in the circumstances set forth in Section 770.3a(2). Mich. Ct. R. 6.302(B)(5), (6). The state accordingly argues that – even if the right to counsel under *Douglas v. California*, 372 U.S. 353 (1963), extends to appeals from convictions entered on guilty or no contest pleas, Mich. Ct. R. 6.302 is a valid exercise of Michigan's purported power to compel indigent defendants to waive their right to appellate counsel as a prerequisite to acceptance of indigents' guilty or no contest pleas. Brief in Opposition at 19-20.

There is considerable irony in the state's promulgation of this theory. Rule 6.302(B) effectuates Section 770.3a(4), which statute requires that a trial court "shall advise the defendant that, . . . if the plea is accepted by the court, the defendant waives the right to have an attorney appointed at public expense to assist in filing an application for leave to appeal . . . and shall determine whether the defendant understands the waiver." § 770.3a(4), MICH. COMP. LAW. The state, however, would have the Court hold that Section 770.3a(4) and Rule 6.302(B) should survive a declaration that Section 770.3a(1) is unconstitutional, such that Michigan – which promulgated the statute and rule to enforce its determination that there is no right to appellate counsel on appeal from plea-based convictions – can use subsection (4) to enforce a waiver of the constitutional right to appellate counsel once its statute is stricken as unconstitutional.

While a declaration that one section of a statute is unconstitutional "does not necessarily defeat or affect the validity of its remaining provisions," the unconstitutional provision can be treated as severable only "if what is left is fully operative as law," such that the legislative body would have enacted the remaining provisions independently of the unconstitutional section. *Champlin Rfg. Co. v. Corporation Comm'n of Okla.*, 286 U.S. 210, 234 (1932) (citations omitted). "Severablity is of course a matter of state law," requiring this Court to determine whether an unconstitutional provision can be stricken, while leaving the remainder of the statute enforceable under state law. *Leavitt v. Jane L.*, 518 U.S. 137, 139-40 (1996).

Michigan follows the usual rule that, "[i]f a portion of an act is invalid, a court should enforce the remainder to the extent that it can be given effect consistent with the legislative intent underlying the act." *County Road Ass'n of Mich. v. Governor*, 677 N.W.2d 340, 348 (Mich. Ct. App. 2004) (citation omitted).[2] "To be capable of separate enforcement, the valid portion of the statute must be independent of the invalid sections, forming a complete act within itself." *Pletz v. Secretary of State*, 336 N.W.2d 789, 809 (Mich. Ct. App. 1983) (footnote omitted). One test for making that determination "is whether the law-making body would have passed the statute had it been aware that portions therein would be declared to be invalid and, consequently, excised." *Id.* (footnote omitted). "When the valid object of the act can be achieved without the invalid part, the act will be upheld." *Michigan State AFL-CIO v. Michigan Employment Relations Comm'n*, 538 N.W.2d 433, 447 (Mich. Ct. App. 1995) (citation omitted), *aff'd*, 551 N.W.2d 165 (Mich. 1996).

2. By statute, "[i]f any portion of an act . . . shall be found to be invalid by a court, such invalidity shall not affect the remaining portions . . . which can be given effect without the invalid portion . . . , and to this end acts are declared to be severable." MICH. COMP. LAWS, § 8.5.

The state has never explained how subsection (4) can reasonably be seen as severable from the remainder of Section 770.3a. No such construction is possible: subsection (4) merely enforces the purported lack of entitlement to appointed counsel that Michigan enacted in subsection (1). And Mich. Ct. R. 6.302 merely further effectuates the statutory directive. Subsection (4) was not adopted to work a waiver of the right to counsel, but to effectuate a legislative determination that *no right to counsel* exists for appellate review of plea-based convictions. Because that provision is not severable, the waiver theory should fail at the outset.

B. Demanding a Waiver of the Constitutional Right to Counsel by Indigent Defendants Who Wish to Plead Guilty or No Contest Violates the Equal Protection Clause of the Fourteenth Amendment.

As petitioner correctly notes, the state's waiver theory itself gives rise to an equal protection violation. Reduced to its essence, that argument would mean that the states – even if required by the Fourteenth Amendment to provide appellate counsel to indigents who plead guilty or no contest, may then deny that right as a condition of a guilty or no contest plea – thus effectively denying meaningful appellate review to indigents who do not elect to go to trial. This facile attempt to avoid the implications of a ruling that *Douglas* extends to Michigan's appellate procedure for appeals from convictions entered on guilty or no contest pleas cannot succeed.

1. A waiver of the right to counsel on appeal is not an inherent incident of a guilty or no contest plea.

It is unacceptable for the state to argue that its waiver theory is analogous to the well-recognized waiver of trial rights that is necessarily worked by a guilty or no contest plea. Brief in Opposition at 19-20. There is a dispositive distinction:

> [A] guilty plea represents a break in the chain of events *which has preceded it* in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred *prior to the entry of the guilty plea.*

Tollett v. Henderson, 411 U.S. 258, 267 (1973) (emphasis added). So it is that a guilty plea waives the right to a jury trial, the privilege against self-incrimination, and the right to confront one's accusers. *Brady v. United States*, 397 U.S. 742, 748 (1970); *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969).[3]

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3. The Michigan Supreme Court's decision in *People v. Bulger*, 614 N.W.2d 103 (Mich.), *cert. denied*, 531 U.S. 994 (2000), sets forth a list of "issues" that a defendant waives by entering a guilty or no contest plea, *e.g.*, "search and seizure claims," issues "relating to the defendant's factual guilt and the prosecution's ability to prove the case," and denial of speedy trial. *Id.* at 112 n.7. Of course, those "issues" are conceptually no different from the constitutional rights identified in *Brady* and *Boykin*, in that they stem from *pre-guilty plea* proceedings and events.

That a guilty or no contest plea waives significant constitutional rights necessarily limits the scope of potential appellate issues following a conviction entered on a plea. But the state, while relying on the purported absence of a federal constitutional right to a criminal appeal, Brief in Opposition at 16-17 (citing *McKane v. Durston*, 153 U.S. 684 (1894)), recognizes, as it must, that Michigan has provided an appellate framework for appeals from convictions entered on guilty or no contest pleas. *Id.* at 20-21. And that framework exists *only* for appeals from guilty or no contest pleas. *Id.* There is thus no basis for arguing that, in Michigan, a guilty or no contest plea inherently waives the right to an appeal for *any* defendant, whether moneyed *or* indigent.[4]

The "waiver" argument thus founders on the same constitutional principle that invalidates Section 770.3a. It is *only* indigent defendants who, according to the state, must waive the right to appellate counsel in order to enter a guilty or no contest plea in Michigan. But this Court in *Douglas* left no room for doubt that "discrimination against the indigent" on a matter so fundamental as the right to counsel is an "evil," because "there can be no equal justice where the kind of appeal a man enjoys 'depends on the amount of money he has.'" *Douglas*, 372 U.S. at 355 (citation omitted).

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4. The state cites *Iowa v. Tovar*, 541 U.S. __, 124 S. Ct. 1379 (2004). Brief in Opposition at 19. But *Tovar* holds only that a defendant "may choose to forgo representation" in pleading guilty, 124 S. Ct. at 1387, that the defendant in that case had done so, and that additional admonitions required by the Iowa Supreme Court were not constitutionally required. *Id.* at 1388-90. Nothing in *Tovar* supports the notion that an indigent defendant can be *compelled* to waive the right to appointed appellate counsel as a precondition to entering a guilty or no contest plea.

The state's argument would, carried to its logical extent, authorize a judge – in a jurisdiction that does not have Michigan's unique statutory scheme – simply to announce that he or she will not accept a guilty plea from an indigent defendant unless that defendant waives the right to appellate counsel.

2. The Equal Protection Clause forbids forcing indigent defendants to waive their right to appellate counsel.

As this Court has recognized, criminal defendants face "difficult choices" in the "plea bargaining process" when compelled to weigh "the risk of more severe punishment" after a trial against "substantial benefits in return for the plea." *United States v. Mezzanatto*, 513 U.S. 196, 209-10 (1995) (citations omitted). But "the imposition of these difficult choices [is] an inevitable – and permissible – attribute of any legitimate system which tolerates and encourages the negotiation of pleas." *Id.* at 210 (citations and internal quotations omitted). The prosecution may offer to condition a plea on a defendant's waiver of rights that are not inherently waived by a guilty plea and, if the defendant's waiver is knowing and voluntary, the bargain will be upheld. *Id.* at 210-11 (upholding plea agreement that included defendant's waiver of protections against use of statements made in course of plea discussions); *see Town of Newton v. Rumery*, 480 U.S. 386, 394 (1987) (voluntary "release-dismissal agreement," in which defendant waived right to 42 U.S.C. § 1983 action in exchange for dismissal, is constitutionally valid); *Barry v. Peterson*, 887 F.2d 635, 639-40 (5th Cir. 1989) (upholding defendant's execution of covenant not to sue county for injuries suffered in jail as part of plea bargain). *See also Parrish v. Fulcomer*, 150 F.3d

326, 328 (3d Cir. 1998) (upholding defendant's waiver of jury trial in exchange for state's agreement not to seek death penalty); *Lake James Cmty. Volunteer Fire Dep't, Inc. v. Burke County, N.C.*, 149 F.3d 277, 280 (4th Cir. 1998) ("[t]he contractual waiver of a constitutional right must be a knowing waiver, must be voluntarily given, and must not undermine the relevant public interest") (citation omitted), *cert. denied*, 525 U.S. 1106 (1999).

The courts of appeal have addressed waivers of the right to appeal as a component of a plea bargain. *E.g.*, *United States v. Hahn*, 359 F.3d 1315, 1324-27 (10th Cir. 2004) (*en banc*); *United States v. Andis*, 333 F.3d 886, 889-92 (8th Cir.) (*en banc*), *cert. denied*, __ U.S. __, 124 S. Ct. 501 (2003); *United States v. Teeter*, 257 F.3d 14, 23-26 (1st Cir. 2001). Such waivers must, of course, be knowing and voluntary, and are subject to being set aside to allow appellate review when a miscarriage of justice would result from enforcement. *E.g.*, *Hahn*, 359 F.3d 1324-28. But it goes without saying that such waivers are not imposed by federal law. Indeed, an appeal from a plea-based conviction is allowed as a matter of right under 18 U.S.C. § 3742 for a challenge to the legality of the sentence. *Hahn*, 359 F.3d at 1320-22. And there is no limitation on the right to counsel that mirrors Michigan's coercive scheme.

In the context of negotiated waivers of the right to appeal, a miscarriage of justice will be found "where the district court relied on an impermissible factor, such as race." *Hahn*, 359 F.3d at 1327 (citation omitted); *accord*, *e.g.*, *Andis*, 333 F.3d at 891; *United States v. Elliott*, 264 F.3d 1171, 1173 (10th Cir. 2001). Michigan's requirement that indigent defendants waive their right to appellate counsel to enter a guilty or no contest plea is indisputably based on a wealth-

based distinction, because only poor defendants are required to waive the right in order to enter a plea.

Thus, waivers of constitutional rights that would pass muster under *Mezzanatto*'s rationale, or under that which permits voluntary waivers of the right to appeal, are fundamentally different from the "waiver" that the state would have the Court approve here. It is one thing for the prosecution to negotiate a plea agreement that includes waivers other than those that are inherent in every guilty or no contest plea, and quite another for Michigan to *compel* a waiver of the right to appellate counsel as a precondition to accepting such a plea by an indigent defendant – when no such waiver is demanded of a moneyed defendant.

This Court declined to enforce a waiver of a fundamental right – even when that waiver was freely negotiated between the prosecution and defense – in *Wheat v. United States*, 486 U.S. 153 (1988). The defendant waived his Sixth Amendment right to be represented by conflict-free counsel, but the Court rejected the purported waiver, because to allow the defendant to be represented by an attorney with a conflict of interest "constitutes a breach of professional ethics and invites disrespect for the integrity of the court." *Id.* at 162 (citation omitted). And more recently, the Court recognized in *Mezzanatto* that, while the waiver of the protection against use of statements made during plea negotiations in that case was constitutionally acceptable, "[t]here may be some evidentiary protections that are so fundamental to the reliability of the factfinding process that they may never be waived without irreparably 'discredit[ing] the federal courts.'" 513 U.S. at 204 (citations omitted). The forced extraction of a waiver from an indigent defendant would indeed bring discredit upon the criminal justice system by

institutionalizing discrimination against criminal defendants, solely on the basis of their indigency.

3. Compelled waivers of the right to appellate counsel deny indigent defendants substantial equality in the criminal appellate process.

This Court has often addressed equal protection concerns in the context of criminal appellate review, beginning with *Griffin v. Illinois*, 351 U.S. 12 (1956), and more recently reaffirming that "an indigent must receive 'substantial equality' compared to the legal assistance that *a defendant with paid counsel would receive.*" *Smith v. Robbins*, 528 U.S. 259, 277 n.9 (2000) (citation omitted; emphasis added). That "substantial equality" requires, at a minimum, that an indigent defendant, "in *all* cases, have the right to have an attorney, zealous for the indigent's interests, evaluate his case and attempt to discern nonfrivolous arguments." *Id.* at 278 n.10 (citations omitted; emphasis added). The *Griffin* principle – which "reflect[s] both equal protection and due process concerns," *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996) (citation omitted) – safeguards the "right of *access to the courts.*" *Lewis v. Casey*, 518 U.S. 343, 350 (1996) (original emphasis). Michigan demands that indigent defendants must surrender perhaps the most essential component of the right of access to appellate review, *i.e.*, the assistance of a zealous appellate advocate, in order to enter a guilty or no contest plea. And *only* indigents are required to do so.

The analytical flaw in the state's argument is perhaps best demonstrated by this Court's decisions in *James v. Strange*, 407 U.S. 128 (1972), and *Fuller v. Oregon*, 417 U.S. 40 (1974). In *James*, the Court invalidated a recoupment statute that allowed Kansas to recover the costs of appointed

counsel by imposing a lien on the indigent defendant, and which deprived the defendant of "any of the exemptions . . . for other judgment debtors except the homestead exemption." *Id.* at 130-31. That provision "strip[ped] from indigent defendants the array of protective exemptions Kansas has erected for other civil judgment debtors, including restrictions on the amount of disposable earnings subject to garnishment." *Id.* at 135. Moneyed defendants who hired their own lawyers, however, faced no such disadvantage:

> The indigent's predicament under this statute comes into sharper focus when compared with that of one who has hired counsel in his defense. Should the latter prove unable to pay and a judgment be obtained against him, his obligation would become enforceable under . . . the Kansas Code of Civil Procedure. But, unlike the indigent under the recoupment statute, the code's exemptions would protect this judgment debtor.

Id. at 136-37.

The Court held that "to impose these harsh conditions on a class of debtors who were provided counsel as required by the Constitution is to practice . . . a discrimination which the Equal Protection Clause proscribes." 407 U.S. at 140-41. And the Court spoke in no uncertain terms in condemning the statute:

> We . . . recognize that state recoupment statutes may betoken legitimate state interest. But these interests are not thwarted by requiring more even treatment of indigent criminal defendants with other classes of debtors. . . . The statute

> before us embodies elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law.

Id. at 141-42.

In contrast, payment under the Oregon recoupment statute challenged in *Fuller* required that the defendant be able to pay, taking into account the defendant's resources, and also allowed for remission. 417 U.S. at 45. As the Court observed, the statute was "quite clearly directed only at those convicted defendants who are indigent at the time of the criminal proceedings against them but who subsequently gain the ability to pay the expenses of legal representation." *Id.* at 46. The Court distinguished *James v. Strange*, primarily because "[t]he convicted person from whom recoupment is sought thus retains all the exemptions accorded other judgment debtors," as well as the right to seek to remit the debt upon a showing of hardship. *Id.* at 47-48. Thus, although only indigent defendants were within the scope of the recoupment statute, their debt was treated no differently than the debt of a moneyed defendant to retained counsel. *Id.* at 48 (statute "is wholly free of the kind of discrimination that was held in *James v. Strange* to violate the Equal Protection Clause").

James and *Fuller* elucidate the egregious equal protection flaw that is inherent in the waiver theory. The requirement that indigent defendants – and *only* indigent defendants – must waive their right to appellate counsel if they wish to enter a guilty or no contest plea, while moneyed defendants are free to pursue their right to seek leave to appeal *with the assistance of counsel*, like the Kansas recoupment statute that was struck down in *James*, "embodies elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law." 407 U.S. at 141-42.

The logical import of the waiver theory is that Michigan, if it can force indigent defendants to surrender their right to appellate counsel in exchange for allowing indigents to plead guilty, could similarly require that indigent defendants surrender a plethora of other rights, for example, their rights to a transcript at state expense and to file an appeal without a filing fee. There is no impediment to such extraordinary results in the analysis that the state advances in support of its waiver theory. The interests that purportedly underlie the state's waiver theory could easily be invoked to require indigents to pay filing fees for an appeal or to deny indigent defendants access to a transcript, the unfairness of which this Court, in unbroken lineage, has long decried. *E.g.*, *Draper v. Washington*, 372 U.S. 487, 496 (1963) ("the State must provide the indigent defendant with means of presenting his contentions to the appellate court which are as good as those available to a nonindigent defendant with similar contentions"); *Burns v. Ohio*, 360 U.S. 252, 257-58 (1959) (imposition of filing fees on indigent defendant violates equal protection); *Eskridge v. Washington State Bd. of Prison Terms & Paroles*, 357 U.S. 214, 215-16 (1958) (indigent defendant entitled to free transcript); *Griffin*, 351 U.S. at 19 ("[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts"). Indeed, *Griffin*'s equal protection values relate precisely "to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs." *M.L.B.*, 519 U.S. at 120 (citation omitted).

What is at stake is thus nothing less than the entire panoply of protections that the Court has erected to protect the rights of indigent criminal appellants. The state well knows that the vast majority of criminal prosecutions of indigent defendants are resolved by plea-based convictions.

If the states can insulate plea-based convictions from appellate review by compelled "waivers" of rights that this Court has proclaimed as necessary to ensure fairness for indigents in the appellate process, the states may well achieve finality in the criminal process, but at the cost of insulating errors – including excessive sentences – from appellate review by indigent defendants. *See* Mara Matuszak, *Limiting Michigan's Guilty and Nolo Contendere Plea Appeals*, 73 U. DET. MERCY L. REV. 431, 440-43 (1996) (noting varying estimates of percentage of defendants who obtained relief on appeals from plea-based convictions before adoption of amendment to Section 20). That scenario invokes the due process imperative that informs the *Griffin-Douglas* rationale, *i.e.*, "the essential fairness of the state-ordered proceedings anterior to adverse state action." *M.L.B.*, 519 U.S. at 120 (citation omitted).

Indeed, this Court has said that, "[b]ecause the fundamental importance of the assistance of counsel does not cease as the prosecutorial process moves from the trial to the appellate stage . . . the presumption of prejudice must extend . . . to the denial of counsel on appeal." *Penson v. Ohio*, 488 U.S. 75, 88 (1988). Yet, the state's waiver theory would institutionalize the denial of appellate counsel to indigent defendants as a condition precedent to acceptance of a guilty or no contest plea.

The scheme that the state urges the Court to approve would demand that indigent defendants, unlike their moneyed counterparts, must either accept a presumptively prejudiced appellate framework or take their chances at trial. Enforcing that harsh choice hardly does credit to the courts that must strip impoverished defendants of their right to counsel, or to the overarching statutory scheme that compels the courts to do so.

CONCLUSION

Based on the foregoing and the reasons set forth in petitioner's brief, the judgment of the Michigan Court of Appeals denying petitioner's application for leave to appeal should be vacated, petitioner should be afforded appointed appellate counsel, and petitioner should then be permitted to file a new application for leave to appeal with the assistance of appellate counsel.

Respectfully submitted,

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October Term, 2004
IN THE SUPREME COURT
OF THE UNITED STATES

ANTONIO DWAYNE HALBERT,
Petitioner

v

STATE OF MICHIGAN
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF MICHIGAN

BRIEF FOR WAYNE COUNTY, MICHIGAN AS AMICUS, SUPPORTING RESPONDENT

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Statement of The Question

I.

Through its Constitution, Michigan provides an appeal of right to all defendants convicted by trial but only a discretionary appeal by leave to those convicted by plea. Michigan statute prohibits the appointment of counsel for those convicted by plea except in specified circumstances, some of which *require* the appointment of counsel. Does anything in the United States Constitution require a State to appoint counsel for an indigent defendant to file a discretionary appeal from a plea of guilty?

Statement of Facts

Amicus joins in the Statement of Facts of the Respondent.

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Argument

I.

A defendant is not constitutionally entitled to the appointment of counsel to prepare a discretionary application for leave from his conviction by way of a plea of guilty.

The precise rationale for the Griffin *and* Douglas *lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment. Neither Clause by itself provides an entirely satisfactory basis for the result reached....* [1]

I. Introduction

A. <u>The Michigan Constitutional and Statutory Scheme</u>

In Article 1, § 20, the Michigan Constitution provides a right of appeal to those convicted in criminal cases, except that "an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court." The restriction to a discretionary appeal by leave for those convicted by way of a plea was added by the People of the State in 1994, approving a ballot proposal to achieve this result.[2] As a consequence, the Michigan legislature enacted MCL 770.3a, which prohibits the appointment of counsel for preparation of

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1. *Ross* v *Moffitt*, 417 US 600, 94 S Ct 2437, 41 L Ed 2d 341 (1974).

2. 1994 Senate Joint Resolution D, ratified at the November 8, 1994, general election as Ballot Proposal B.

the application for leave to appeal from a conviction by plea, with certain exceptions. Counsel *must* be appointed:

- If the prosecuting attorney seeks leave to appeal;
- if the defendant's sentence exceeds the upper limit of the minimum range of the sentencing guidelines;
- if the defendant seeks leave to appeal from a conditional plea; and
- if the Court of Appeals or Supreme Court grants the defendant's application for leave to appeal.

Further, the trial court has the discretion to appoint counsel where:

- the defendant seeks leave where the sentence is based on an alleged improper scoring of an offense or prior record variable, *and*
- the defendant objected to the scoring or otherwise preserved the issue for appeal, *and*
- the sentence imposed constitutes an upward departure from the upper limit of the minimum range if the guidelines were scored as the defendant claims appropriate.

B. <u>The Constitutional Texts</u>

Amicus believes it wise always to begin with the actual language of the constitutional provision or provisions at issue, for reference only to the judicial gloss which has been given the relevant provisions or provisions can lead one far astray. As has been noted in a related context,

> Applied to an erroneous point of departure, the logical reasoning that is ordinarily the

> mechanism of judicial adherence to the rule of law perversely carries the Court further and further from the meaning of the (provision). ...there comes a point at which a later incremental step, again rational in itself, leads to a result so far removed from the (text) that obedience to text must overcome fidelity to logic.....: "The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth 'logical' extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the 'line drawing' familiar in the judicial, as in the legislative process: 'thus far but not beyond.'"[3]

Amicus thus begins with the relevant text.

> The 14th Amendment provides, in relevant part: No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The search for a possible constitutional basis for a right to counsel on a first appeal when that appeal is discretionary with the appellate court is difficult, and the cases from this Court are often less than clear, complicating the matter, for to this day "(t)he precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated." *Ross v Moffitt,* supra. Amicus will look to Due

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3. *National Labor Relations Board* v *International Brotherhood of Electrical Workers*, 481 US 573, 107 S Ct 2002, 95 L Ed 2d 557 (1986)(Scalia, concurring).

Process and Equal Protection principles,[4] beginning the hunt with the Due Process Clause.

II. The Due Process and Equal Protection Clauses

A. Due Process and Appeals

It is not necessary in this case to step into the quagmire that is the oxymoron of "substantive due process."[5] On any plausible reading of the text the Due Process Clause sets *no* "right" of persons beyond the reach of government, instead specifically providing that an individual *can* in fact be deprived by the State of his or her property (in whatever aspect), his or her liberty (in whatever aspect), and even his or her very *life*, the Clause containing the limitation that any such deprivation *must* occur in accordance with "due process of law," which protection plainly is, then, a procedural guarantee. How a constitutional provision which expressly authorizes the taking of life, liberty, or property, so long as in accordance with due process of law, has come to be viewed as mandating recognition of certain interests which are "undeprivable" no matter the sort of process provided, remains something of a mystery.

Here, though, "substantive" process plays no part, for this case concerns the Due Process Clause in its obvious procedural form, at issue being the quintessential "liberty" interest of individuals, deprivation of which by the State is contingent upon due process of law–a criminal conviction results in the loss of liberty either by confinement or through restrictions associated with probation, and perhaps some loss of property through fine. This deprivation of liberty must, as commanded by the 14th Amendment, occur in accordance with "due process" of law. The bulk of the process which is "due" a criminally accused appears in specific portions of the Bill of Rights, applied to the States through the doctrine of selective incorporation. Thus, the accused is protected by, among others, principles of double jeopardy, the right against self-incrimination, the right to a speedy trial, the right to a public trial, the right to fair notice (to be informed of the nature and cause of the accusation), the right to confrontation, the right to compulsory process, and the right to the effective assistance of counsel. Other requirements essential to fair procedure have been identified, which generally are subsidiary to these rights, such as the right to an impartial judge, the right to an impartial jury, the right not to be compelled to trial garbed in identifiable jail clothing (thereby compromising the right to an impartial fact-finder), and so on. But what of the right to appellate review? Is there a right under the Due Process Clause to appellate review of a criminal conviction as a necessary requisite to the deprivation of liberty permitted by that Clause so long as in accordance with due process?

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4. Justice Thomas has said in a closely related context: "I therefore analyze petitioner's claim under both the Due Process and Equal Protection Clauses. If neither Clause affords petitioner the right...(claimed), I assume that no amalgam of the two does." *M.L.B.* v *S.L.J.*, 519 US 102, 117 S Ct 555, 136 L Ed 2d 473 (1996) (Thomas, J, dissenting, 117 S Ct at 570).

5. "[T]here is simply no avoiding the fact that the word that follows 'due' is 'process.' ... Familiarity breeds inattention, and we apparently need periodic reminding that 'substantive due process' is a contradiction in terms--sort of like 'green pastel redness.' " John Hart Ely, *Democracy and Distrust*, p. 18 (1980). See also *National Paint* v *City of Chicago*, 45 F3d 1124, 1128 (CA 7, 1995) ("Plaintiffs...assert...that the ordinance is a violation of substantive due process. Now we have spent some time looking through the Constitution for the Substantive Due Process Clause without finding it"); *Mays* v *City of East St. Louis*, 123 F3d 99, 1001 (CA 7, 1997)("...'substantive due process' is an oxymoron").

The answer, of course, is "no," as has been established for over a century. The lead case is *McKane* v *Durston*.[6] There the accused was convicted at trial with election fraud and sentenced to Sing Sing prison for six years. He was neither entitled to bail nor admitted to discretionary bail, and claimed a constitutional right to bail pending appeal; in essence, he claimed that he was due the "process" of an appeal *before* his liberty could constitutionally be restrained. Writing for a unanimous Court, the first Justice Harlan observed that

> A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review. A citation of authorities upon the point is unnecessary. It is therefore clear that the right of appeal may be accorded by the state to the accused *upon such terms as in its wisdom may be deemed proper*.

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6. *McKane* v *Durston*, 153 US 684, 14 S Ct 913, 38 L Ed 867 (1894).

7. 153 US at 687, 14 S Ct at 915 (emphasis supplied).

The point has been reiterated time and again.[8] After all, no appeals from convictions in the federal courts were permitted until late in the 19th century.[9]

It ineluctably follows from the fact that the process which is "due" before liberty may be taken by way of a criminal prosecution does not include the right to appellate review that when appellate review *is* provided it may, at least under the Due Process Clause, be "accorded by the state to the accused *upon such terms as in its wisdom may be deemed proper,"* as the formidable first Justice Harlan wrote for the Court over a century ago. The Due Process Clause simply has nothing to say about whether provision of a discretionary first appeal rather than a first appeal of right requires the appointment of counsel, for that Clause does not require the existence of the process of an appeal of any sort in the first instance. This leaves the Equal Protection Clause as the only possible source of a constitutional command that counsel be appointed on a discretionary first appeal, for though the Due Process Clause does not require the process of an appeal, if the State decides, by law, to provide for an appeal, then it must not deny to any person the "equal protection" of that law.

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8. See *Griffin* v *Illinois*, 351 US 12, 76 S Ct 585, 590, 100 L Ed 891 (1956)("It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all"); *Ross v Moffitt*, supra, 94 S Ct at 2442 ("...a State is not obliged to provide any appeal at all for criminal defendants"); *Pennsylvania* v *Finley*, 481 US 551, 107 S Ct 1990, 1993, 95 L Ed 2d 539 (1987)("...it is clear that the State need not provide any appeal at all"); *M.L.B. v S.L.J.*, supra, 117 S Ct at 560 ("...the Federal Constitution guarantees no right to appellate review....").

9. See *Griffin v Illinois*, supra, 76 S Ct at 591 (Justice Frankfurter, concurring).

B. Equal Protection and Appeals

The respondent, however, can find no succor in the Equal Protection Clause. That Clause "confers no substantive rights and creates no substantive liberties."[10] The equal protection claim is that those who have sufficient funds can hire counsel to represent them to prepare and file an application for leave to appeal, while those without sufficient funds are without counsel unless the State assists them by providing counsel at State expense. Does the Equal Protection Clause require that the State provide this affirmative assistance, or is this a matter for the political branches of government to decide?

As an initial matter, amicus has trouble understanding how a constitutional provision establishing a neutral method of seeking review of a conviction entered by way of a plea of guilty is nonetheless discriminatory against the poor and denies "any person...equal protection of the laws" simply because some people will be unable to pay for counsel to assist them in seeking review,[11] for it cannot be gainsaid that the portion of Article 1, § 20 in question is neutral on its face. Though reasonable people can perhaps disagree regarding the wisdom of the 1994 amendment, there is no question that its purpose was non-discriminatory. The genesis of the

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10. *San Antonio Independent School District* v *Rodriquez*, 411 US 1, 93 S Ct 1278, 1309, 36 L Ed 2d 16 (1973)(Stewart, J., concurring).

11. Cf. *Washington* v *Davis*, 426 US 229, 96 S Ct 2040, 2050, 48 L Ed 2d 597 (1976)"As an initial matter, we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies 'any person . . . equal protection of the laws' simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups." 96 S Ct at 2050.

amendment was a backlog in the Michigan Court of Appeals causing at least a two year delay from the filing of an appeal to decision.[12] Pursuant to the call of the President of the State Bar of Michigan, the State Bar Board of Commissioners created a special Task Force to study the backlog problem, and that Task Force recommended a constitutional change in guilty plea appeals, so that where the defendant was made aware of the sentence to be imposed prior to the plea, and that sentence was imposed, appeal would be by leave; the Task Force also expressed its view that the right to a transcript and to counsel should remain.[13] These recommendations ultimately became the amendment to Article 1, § 20, eliminating the appeal of right in guilty plea and nolo contendere convictions, and saying nothing about counsel.

The Amendment is the law of Michigan, and it cannot be argued that there was any purpose on the part of the Legislature or the People of the State to discriminate against the poor. An equal protection claim thus must rest on an argument that the Amendment has a "disparate impact" on the indigent, who will be less able to avail themselves of the application for leave process successfully than those who can afford to retain counsel. But under well-settled equal protection doctrine, disparate impact, even if proven, is insufficient to raise a constitutional claim as against a facially neutral statute (or constitutional provision).[14]

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12. See Robert Webster, "Introduction to the Report of the Task Force on Appellate Courts," 7 Mich B J 895 (1993).

13. See 7 Mich B J at 898, and also Mr. Ward's dissent at 903-904

14. See *San Antonio Independent School District*, supra, rejecting a claim that Texas school financing denied equal protection of the law to the poor, makes the point, observing that "at least where wealth is involved, the Equal Protection Clause does not require absolute equality or

That a "disparate impact" is insufficient to support an equal protection claim was made absolutely clear by this Court in *Washington v Davis*. The claim brought was that a portion of an employment test for police officer in the District of Columbia, neutral on its face, denied equal protection to black applicants because a higher percentage of black applicants failed that portion of the test than did Caucasian applicants. The Court disagreed, observing that "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact."[15] A discriminatory *purpose* is a necessary part of an equal protection claim, for a "rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more *burdensome to the poor* and to the average black than to the more affluent white."[16]

Davis was followed in *Village of Arlington Heights* v *Metropolitan Housing Development*.[17] An equal protection

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precisely equal advantages." 93 S Ct at 1292. Part of the basis of the dissenting opinion in *Kowalski v Tesmer*, __US__, 125 S Ct 564 (2004) appears to be precisely simply that it is more difficult for a defendant proceeding without counsel to file an application for leave to appeal than it is for one who has counsel. 125 S Ct at 574.

15. 96 S Ct at 2046.

16. 96 S Ct at 2050 (emphasis supplied).

17. *Village of Arlington Heights* v *Metropolitan Housing Development*, 429 US 252, 97 S Ct 555, 50 L Ed 2d 450

challenge to zoning requirements which prevented the building of multi-family low income housing was rejected as absent was any showing of discriminatory purpose. *Davis* made it clear, said the Court, that an official action "will not be held unconstitutional solely because it results in a ...disproportionate impact;" rather, "(p)roof of ...discriminatory intent or purpose is required to show a violation of the Equal Protection Clause," *Davis* simply reaffirming "a principle well established in a variety of contexts." 97 S Ct at 563 (see also *Smith* v *Boyle*, 144 F3d 1060, 1064 (CA 7, 1998): "...to be actionable a denial of equal protection must be intentional....disparate impact–a law's unintentionally bearing harder on one group than another–is not a permissible basis for finding a denial of equal protection"; *McLean* v *Crabtree*, 173 F3d 1176, 1185 (CA 9, 1999): "...discriminatory intent is required to show that state action having a disparate impact violates the Equal Protection Clause"; *Keevan* v *Smith*, 100 F3d 644, 651 (CA 8, 1996): "Because the policy challenged by the appellants is neutral on its face, the female prisoners must establish that the alleged disparate impact is the result of discriminatory purpose," the court rejecting a claim that a prison industry program discriminated on the ground of sex; *Black* v *Secretary of Health and Human Services*, 93 F3d 781, 788 (CA Fed, 1996): the court rejecting a claim of equal protection based on indigency, noting that "...the fact that the statute may have a *disparate impact on indigents* does not call for heightened scrutiny under equal protection principles"; *Tucker* v *United States Department of Commerce*, 958 F2d 1411, 1413-1414 (CA 7, 1992): rejecting a "census undercount" claim, remarking that the "..only discrimination forbidden by (the Equal Protection Clause) is intentional discrimination. Disparate impact, which means the unintended consequences of measures adopted for reasons unrelated to any intention to discriminate, is not, under this Court's current interpretation

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(1977).

of the Constitution, an acceptable basis for a finding of unconstitutional discrimination...."

Moreover, even if it could be shown that the legislature and/or the People of the State had intentionally created a classification based on ability to pay, "neither indigents nor prisoners are a suspect class," so that "such differentiation is permissible as long as even a rational basis for the differing treatment can be shown."[18] While reasonable people might disagree as to whether the Amendment to Article 1, § 20 is sound policy, no reasonable person could support a contention that it is unsupported by a "rational basis." It is certainly rational to treat guilty plea cases and convictions arising from trials differently in terms of appeal.

Under current Equal Protection Clause principles, then, there can be no successful claim that the Clause requires the appointment of counsel for a discretionary first appeal because there can be shown no intent to discriminate, and a failure to "carry (the) burden of proving that discriminatory purpose was a motivating factor....ends the constitutional inquiry....(proof of) a discriminatory 'ultimate effect' is without independent constitutional significance."[19] Moreover, even if a "discriminatory purpose" could be shown, the classification is supported by a rational basis.

III. "Access to The Courts"

A. Griffin, Douglas, and Moffitt

Analysis should begin with *Griffin*. That case involved a state appeal of right from a criminal conviction,

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18. *Wilson* v *Yaklich*, 148 F3d 596 (CA 6, 1998); see also San Antonio Independent School District, supra; *Harris* v *McRae*, 448 US 297, 100 S Ct 2671, 65 L Ed 2d 784 (1980).

19. *Arlington Heights*, supra, 97 S Ct at 566.

the question being whether the State of Illinois could "administer this statute so as to deny adequate appellate review to the poor while granting such review to all others" by requiring that all appellants, without regard to ability to pay, file a bill of exceptions, which could not be prepared without a transcript of the trial proceedings. The plurality addressed the question under the "Due Process and Equal Protection Clauses of the Fourteenth Amendment," without differentiating the two, but the opinion of Justice Black clearly sounds in equal protection. That opinion agreed that a State is "not required by the Federal Constitution to provide appellate courts or a right to appellate review at all," but held that when a State does grant appellate review it cannot do so in a way "that discriminates against some convicted defendants on account of their poverty," the convicted defendants being protected "from invidious discriminations." Concluding that "Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts," the Court held that either a transcript must be provided or some "other means of affording adequate and effective appellate review to indigent defendants."[20] Justice Frankfurter concurred, supplying the fifth vote, on equal protection grounds. Though, he said, "a State need not equalize economic conditions," where it has provided a right to appellate review of convictions it cannot set up a system which in effect *completely forecloses* the indigent from its use.[21]

Justice Burton, for himself and Justices Minton, Reed, and Harlan, dissented. The Illinois system could not, Justice Burton said, deny due process, given that the process of an appeal is not required by the constitution at all as a necessary prerequisite to the taking of liberty pursuant to a criminal conviction. An equal protection question could be raised, but

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20. 76 S Ct at 590-591.

21. 76 S Ct at 592-593.

the claim would be unavailing, for the State is not required to equalize economic conditions before its bar of justice, and the law was neutral ("open to all") on its face, a discussion presaging *Davis* and *Arlington Heights*. Justice Harlan in a separate dissen also found no due process or equal protection violations, for the statute was in fact neutral, and what the majority had decided was not that the State of Illinois had discriminated but that it had a duty *to* discriminate. Again, the language sounds much like the modern equal protection analysis in *Davis*, *Arlington Heights*, and many other cases. To the extent a rationale can be discerned from the case, it is an equal protection case, employing an analysis that is today clearly discredited.

In much the same vein is *Douglas*. Again the case concerned an appeal granted by state law as of right to a convicted defendant. The petitioners were denied their request for appointment of counsel on the appeal of right. The Court agreed with the dissenting justice in the California Supreme Court that "denial of counsel on appeal (to an indigent) would seem to be a discrimination at least as invidious as that condemned in *Griffin*...."[22] The majority held that as with *Griffin* "the evil is the same–discrimination against the indigent," which it found could not be permitted "with the first appeal, granted as a matter of right to rich and poor alike... from a criminal conviction."[23] Only a fleeting reference was made to any constitutional provision compelling the appointment of counsel–the 14th Amendment–and no mention was made of some separate right of "meaningful access to the appellate process." The ground of decision, from the language employed, was plainly one of equal protection, through an analysis that no longer obtains in equal protection jurisprudence, the statute being neutral on its face, and there being no demonstration of any

22. 83 S Ct at 815.

23. 83 S Ct at 816.

purposeful discrimination. Justice Harlan dissented once again, rejecting the analysis of the majority in language that is strikingly similar to contemporary equal protection doctrine:

> The States, of course, are prohibited by the Equal Protection Clause from discriminating between "rich" and "poor" as such in the formulation and application of their laws. But it is a far different thing to suggest that this provision prevents the State from adopting a law of general applicability that may affect the poor more harshly than it does the rich, or, on the other hand, from making some effort to redress economic imbalances while not eliminating them entirely.....no one would dispute the constitutional power of the State to levy a uniform sales tax, to charge tuition at a state university, to fix rates for the purpose of water from a municipal corporation, to impose a standard fine for criminal violations, or to establish minimum bail for various categories of offenses....Laws such as these do not deny equal protection to the less fortunate for one essential reason: the Equal Protection Clause does not impose on the States "an affirmative duty to lift the handicaps flowing from differences in economic circumstances.[24]

This opinion, as can readily be seen, reads precisely like modern equal protection cases.

The Court in *Ross v Moffitt*, supra, declined to extend *Douglas* beyond the "first appeal of right" to require counsel "for discretionary state appeals and for applications for review in this Court."[25] The Court held that *Griffin* and related

24. 83 S Ct at 361-362.

25. 94 S Ct at 2438.

decisions concerned "state-imposed financial barriers" which effectively "*cut off* appeal rights for indigents while leaving open avenues of appeal for more affluent persons," while *Douglas*, to insure that an indigent's "access to the appellate system was adequate," had required the appointment of counsel for "initial appeals as of right." And even *Douglas*, the Court quoted, had observed that a "state can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an invidious discrimination....Absolute equality is not required; *lines can be and are drawn and we often sustain them.*"[26]

The ground of decision in *Griffin* and *Douglas* was difficult to discern, found the Court in *Moffitt*. To the extent that Due Process or Equal Protection were employed in those cases, the Court did not believe that either Clause could be viewed as commanding the appointment of counsel for a discretionary appeal. The Court contrasted the appeal from the trial, as in the appeal "it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or a jury below." The question of appointment of counsel under due process principles, the Court said, makes little sense in the context of an appeal, given that there is no Due Process right to an appeal at all; rather, the "question is more profitably considered under an equal protection analysis." The Court concluded that *Griffin*, *Douglas*, and similar cases stand for the proposition that the indigent defendant cannot be "entirely cut off from any appeal at all" or left with a "meaningless ritual,"[27] and that provision of counsel for a discretionary appeal is not required by Equal Protection principles. Once again, under current equal protection principles the issue

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26. 94 S Ct at 2443 (emphasis supplied).

27. 94 S Ct at 2444

would be readily resolved: the existence of a neutral statute, and the absence of a discriminatory intent, would be the end of the inquiry.

Griffin, *Douglas*, and *Moffitt*[28] do not establish any right to "meaningful access to the appellate process" as a part of Due Process, which would, given the lack of a right to an appellate process at all, be impossible; the most that can be said is that the cases preclude the *foreclosure* of an appeal to an indigent that is available to those with funds, or the provision of a "meaningless ritual" to the indigent, and this on an Equal Protection rationale which has been *repudiated by current Equal Protection doctrine*. Given current Equal Protection doctrine, the cases have no constitutional foundation. This is not to say that this Court must necessarily overrule them. But it is certainly appropriate for the Court not to *extend* them; that is, to say, "this far, and no further," given the lack of a constitutional command allowing the exercise of judicial authority to compel the appointment of counsel for an indigent defendant on a discretionary appeal, be it the "first" appeal or not. There is simply no escaping that the Due Process Clause cannot be violated by the manner in which process is given when that process is not required at all by the Due Process Clause, and that Equal Protection cannot be violated absent discriminatory purpose with a neutral law, which is lacking in this case.

B. "Access to the Courts" and the "Prisoner's Rights" Cases

The case generally recognized as the progenitor of the "access to the courts" constitutional doctrine is *Ex parte*

28.And, of course, *Moffitt* has been followed: see *Wainwright* v *Torna*, 455 US 586, 102 S Ct 1300, 71 L Ed 2d 475 (1982) and *Pennsylvania v Finley*, supra ("...the right to appointed counsel extends to the first appeal of right, and no further").

Hull.[29] *Hull* concerned a prison regulation requiring that petitions for habeas corpus be submitted by inmates to a prison administrator for a determination that they were "properly drawn" before filing with the federal court. If the administrator did not approve the petition, it could not be filed. This Court simply held that whether a petition for a writ of habeas corpus addressed to a federal court is "properly drawn" is not a matter for determination by the executive branch of government through its bureaucracy, but for the "court alone to determine." No affirmative obligations by way of assistance to the prisoner were required in *Hull*; rather, the Court held that the executive branch has no business blocking ("abridging or impairing") the filing by prisoners of petitions with a court.

The second lead case, *Johnson* v *Avery*,[30] also imposed no obligation of assistance on the State, instead precluding a different form of State "abridgement or impairment" of inmates filing of legal papers in a federal court. The prison regulation in the Tennessee prison prevented inmates from advising or assisting one another in the preparation of habeas corpus petitions. Given the isolation of inmates from the general population, the rule had the effect, held the Court, of a rule which forbade illiterate or poorly educated prisoners from filing habeas corpus petitions. In the absence of the provision of some other alternative, the regulation thus denied some prisoners access to the court in violation of *Hull*. *Avery* was then followed in *Wolff* v *McDonnell*.[31] Taking up the invitation of the Court in *Avery*,

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29. *Ex parte Hull*, 312 US 546, 61 S Ct 640, 85 L Ed 1034 (1941)

30. *Johnson* v *Avery*, 393 US 483, 89 S Ct 747, 21 L Ed 2d 718 (1969)

31. *Wolff* v *McDonnell*, 418 US 539, 94 S Ct 2963, 41 L Ed 2d 935 (1974).

the Nebraska prison system precluded inmates from assisting one another generally in the preparation of petitions for habeas corpus and civil rights actions, instead providing an alternative, an inmate legal advisor, appointed by the Warden. The Court held that *Avery* extends to civil rights petitions as well as habeas corpus petitions, and directed that the district court hold a hearing to determine the adequacy of the assistance provided by the inmate legal advisor "under the reasonable-alternative standard of *Avery*."[32] Other than the extension to civil rights actions, the rationale of the decision was precisely that of *Avery*–avoidance of the denial to an illiterate or poorly educated inmate of the ability to file a civil rights action. Then came *Bounds* v *Smith*,[33] to be repudiated in part in *Lewis v Casey*, infra.

Bounds conflated the *Griffin/Douglas* line of cases–decided, as has been discussed, on an equal protection theory which the Court had made clear *in Davis* was no longer the law, those cases and their validity not being, however, before the Court in *Davis*–with the *Hull/Avery/Wolff* line of cases, decided on the due process theory that access to the federal courts to file original habeas corpus petitions and original civil rights actions cannot be "abridged or impaired" by the State, but providing no obligation of affirmative assistance on the State, to invent an affirmative obligation on the part of the State to provide either an adequate law library for inmate use or some reasonable alternative, such as the assistance of "persons trained in the law." The Chief Justice, Justice Rehnquist, and Justice Stewart dissented, Justice Rehnquist arguing that the Court had created the right it was announcing "virtually out of whole cloth with little or no

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32. 94 S Ct at 2986.

33. *Bounds* v *Smith*, 430 US 817, 97 S Ct 1491, 52 L Ed 2d 72 (1977),

reference to the Constitution from which it is supposed to be derived."[34]

The Court drew back to a degree, however, in *Lewis v Casey*.[35] Inmates in the Arizona Department of Corrections filed a federal lawsuit pursuant to *Bounds* on the ground that the legal assistance provided by the prison system was inadequate. The federal district court entered an injunctive order specifying in minute detail the hours for the prison library, the hours of use of the library per week to which an inmate was entitled, the minimum educational requirements for the prison librarians (a library science, paralegal, or law degree), the content of a videotaped legal-research course for inmates which the court required be prepared, the regulations for access to the library by prisoners in disciplinary or security segregation, that illiterate and non-English speaking inmates be provided direct assistance from lawyers, paralegals, or a sufficient number of prisoner legal assistants, that bilingual inmates be located and trained as legal assistants, and the like. This Court reversed.

The Court agreed with the State that the systemic challenge of the inmates was unsupported by the record, their being no proof of widespread actual injury under *Bounds*, the district court doing no more than identifying isolated instances of injury. But beyond this the Court also retreated from *Bounds*, remarking that:

> it must be acknowledged that several statements in *Bounds* went beyond the right of access recognized in the earlier cases on which it relied....These statements appear to suggest that the State must enable the prisoner to *discover grievances*, and to *litigate effectively* once in court....These elaborations upon the right of access to the courts have no antecedent in our pre-*Bounds* cases, *and we now disclaim them*....the tools (*Bounds*) requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement.[36]

Inmates do not have a right to become "litigating engines"–they have no right to the assistance of the State to help them "to discover grievances, and to litigate effectively once in court."[37] Rather, because of the "fundamental importance in our constitutional scheme" of the writ of habeas corpus, an original civil action in the federal courts, "access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed."[38] Because the Court could find "no reasonable distinction" between the original action of a petition for writ of habeas corpus and a civil rights action, alleging constitutional error in the manner of treatment or confinement of a prisoner, the Court in *Wolff* held that *Avery* applies to civil rights actions, finding also in these cases that without some form of assistance through either legal assistants or the provision of a law library inmates' ability to have access to the courts to file these original actions is, as a practical matter, "impaired or obstructed." The right to counsel clearly is not required in these cases.

This right of access to the courts cannot, of course, belong only to inmates of correctional institutions, lodged there after a conviction, and who have no due process right to challenge their conviction further through an appellate

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34. 97 S Ct at 1503.

35. *Lewis v Casey*, 518 US 343, 116 S Ct 2174, 135 L Ed 2d 606 (1996).

36. 116 S Ct at 2181 (emphasis supplied).

37. *Lewis v Casey*, 116 S Ct at 2181.

38. See *Wolff v McDonnell*, 94 S Ct at 2985.

process, but *must belong to the **innocent** as well–to **all** of us!* The innocent, however, are not being held in custody, but may wish to bring, in certain circumstances, civil rights actions against the Government. Civil rights actions are scarcely the private domain of the criminally convicted. If a citizen wishes to bring a civil rights action against the Government he or she will not be forgiven the filing fee, will not be provided counsel, and will not be provided either a law library or a legal assistant. Can it be that those convicted of a crime and incarcerated have a right of access to the courts to file original actions challenging the actions of the Government superior to that of innocent citizens? How can this difference in treatment be explained?

Amicus submits that the difference in treatment can only sensibly be explained in one way. As has been explained, the Equal Protection Clause serves no function of "equalizing economic conditions" or opportunities, and so all ordinary citizens, at least hypothetically, have access to the courts, to legal assistants, and to law libraries in that *they are available* if one can avail him or herself of them. But an inmate, by virtue of his or her confinement, has no such hypothetical or possible access; he or she cannot visit a public library, or call upon friends and neighbors for legal advice. His or her access to the courts *to challenge an action or actions of the Government as it affects the inmate personally* is "abridged or restricted" by the *fact* of confinement, though the fact of that confinement be consistent with Due Process of Law.

To the extent there exists a right to "access to the courts," then, it perforce belongs to all citizens and not only inmates, and prevents civil rights actions against the Government from being "impaired or abridged." While for ordinary citizens the Government is under no duty to provide any affirmative assistance whatsoever to the citizen who sues or wishes to sue because that individual at least has the hypothetical opportunity to gain whatever legal assistance may be necessary, including through access to legal materials, the inmate lacks this hypothetical opportunity unless the

Government assists him either through the provision of legal materials or in some other manner–but the appointment of counsel is not required.

IV. Conclusion

There can be no "Due Process" right to "meaningful access" to the appellate process, as liberty may be restrained consistent with Due Process of law after a criminal conviction without any appellate process. *Griffin*, *Douglas*, and *Moffitt* are in truth Equal Protection Clause cases, establishing a right to a transcript and the right to counsel on an *appeal of right*, but based on an equal protection theory *which has been firmly and repeatedly repudiated.* An equal protection violation requires a discriminatory motive, which is absent from these cases and from the present case.

Whether counsel should be provided an indigent defendant convicted by way of plea who wishes to invoke a mechanism for discretionary review is a matter for the political branches of government. No provision of the Constitution can justify judicial intervention, unless we are to "render democratically adopted texts mere springboards for judicial lawmaking."[39]

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39. Scalia, *A Matter of Interpretation*, p.25 (Princeton University Press, 1997).

RELIEF

WHEREFORE, amicus submits that the Michigan Court of Appeals should be affirmed.

Respectfully submitted,

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